(1)

Supreme Court, U.S.
FILED

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No. [redacted]

IN THE
Supreme Court of the United States

HOHENBERG BROS. COMPANY, *et al.*,
Petitioners,

v.

UNITED STATES OF AMERICA,
Respondent.

On Petition For A Writ Of Certiorari
To The U.S. Court Of Appeals For The Federal Circuit

PETITION FOR A WRIT OF CERTIORARI

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98 PP

QUESTION PRESENTED

Whether a taxpayer is entitled to interest on a refund of unconstitutional Harbor Maintenance Tax that the government assessed in violation of the Constitution's Export Clause.

LIST OF PARTIES

All parties do not appear in the caption on the cover page. The following is a list of all parties to the proceeding in the court of appeals (all of which are parties to this petition):

Petitioners

Hohenberg Bros. Company

A.C. Monk and Company, Inc.

The Austin Tobacco Company, Inc.

Cargill Americas, Inc.

Cargill Citro-America, Inc.

Cargill Fertilizer, Inc.

Cargill, Incorporated

Carolina Leaf Tobacco Company, Inc.

Dibrell Brothers, Inc.

Excel Corporation

General Electric Company

K.R. Edwards Leaf Tobacco Company, Inc.

Maclin-Zimmer-McGill Tobacco Co., Inc.

Monk-Austin International, Inc.

Thorpe-Greenville Export Tobacco Co., Inc.

T.S. Ragsdale Company, Inc.

Universal Leaf Tobacco Company, Inc.

U.S. Steel International, Inc.

U.S. Steel Mining Co., Inc.

USX Corporation

USX Engineers & Consultants, Inc.

BASF Corporation

BASF Magnetics Corporation

Akzo Nobel Chemicals, Inc.

Reynolds Metals Company

Zeneca Inc.

ISK Biosciences Corporation

Archer-Daniels-Midland Company

ADM/Growmark River Systems, Inc.

Valley Grain Products, Inc.

The Coleman Company

Hill's Pet Nutrition, Inc.

Standard Commercial Tobacco Company, Inc.

Carolina Trading Corporation

James I. Miller Tobacco Co., Inc.

PMA Incorporated

The Tobacco Trading Corporation

W.A. Adams Company

American Honda Motor Co., Inc.

Honda Trading America Corporation

BP Chemicals, Inc.

CBS Corporation

Continental Grain Company

ContiQuincy Bunge L.L.C.

Tacoma Export Marketing Company

Farmland Industries, Inc.

Farmland Foods, Inc.

Farmland Hydro, L.P.

Tradigrain, Inc.

Tradigrain S.A., Geneva

Lexmark International, Inc.

McDonnell Douglas Corporation

Monsanto Company

Solar Turbines Incorporated

ECC International, Inc.

ECCA Calcium Products, Inc.

Koch Carbon, Inc.

Koch Refining Company

Olin Corporation

Physics International Company

Sterling Chemicals, Inc.

IMC Global Operations, Inc.

IMC-Agrico Company

International Multifoods Corporation

Respondent

United States of America

RULE 29.6 DISCLOSURE

Petitioner Cargill, Incorporated has no parent corporation, and there is no publicly held company that owns 10 percent or more of its stock. Petitioner Cargill, Incorporated is the parent corporation of, or owns 10 percent or more of the stock of, the following other Petitioners: Hohenberg Bros. Company, Cargill Americas, Inc., Cargill Citro-America, Inc., Cargill Fertilizer, Inc., and Excel Corporation.

Universal Leaf Tobacco Company is the parent corporation of, or owns 10 percent or more of the stock of, the following Petitioners: K.R. Edwards Leaf Tobacco Company, Inc., Maclin-Zimmer-McGill Tobacco Co., Inc., Thorpe-Greenville Export Tobacco Co., Inc., and Universal Leaf Tobacco Company, Inc.

Dimon Incorporated is the parent corporation of, or owns 10 percent or more of the stock of, the following Petitioners: A.C. Monk and Company, Inc., The Austin Tobacco Company, Inc., Carolina Leaf Tobacco Company, Inc., Dibrell Brothers, Inc., Monk-Austin International, Inc., and T.S. Ragsdale Company, Inc.

United States Steel, LLC is the parent corporation of, or owns 10 percent or more of the stock of, the following Petitioners: U.S. Steel International, Inc., U.S. Steel Mining Co., Inc., USX Corporation, and USX Engineers & Consultants, Inc.

BASF AG is the parent corporation of, or owns 10 percent or more of the stock of, Petitioner BASF Corporation.

Petitioner BASF Corporation is the parent corporation of, or owns 10 percent or more of the stock of, Petitioner BASF Magnetics Corporation.

Akzo Nobel Inc. is the parent corporation of, or owns 10 percent or more of the stock of, Petitioner Akzo Nobel Chemicals, Inc.

Alcoa, Inc. is the parent corporation of, or owns 10 percent or more of the stock of, Petitioner Reynolds Metals Company.

Zeneca Holdings, Inc. is the parent corporation of, or owns 10 percent or more of the stock of, Petitioner Zeneca Inc.

GB Biosciences Holdings Inc. and Syngenta AG are the parent corporations of, or own 10 percent or more of the stock of, Petitioner ISK Biosciences Corporation.

Petitioner Archer-Daniels-Midland Company has no parent corporation, and there is no publicly held company that owns 10 percent or more of its stock. Archer-Daniels-Midland Company is the parent corporation of, or owns 10 percent or more of the stock of, the following other Petitioners: ADM/Growmark River Systems, Inc. and Valley Grain Products, Inc.

Sunbeam Corporation is the parent corporation of, or owns 10 percent or more of the stock of, Petitioner The Coleman Company.

Colgate-Palmolive Company is the parent corporation of, or owns 10 percent or more of the stock of, Petitioner Hill's Pet Nutrition, Inc.

Standard Commercial Tobacco Co., Inc. is the parent corporation of, or owns 10 percent or more of the stock of, the following Petitioners: Standard Commercial Tobacco Company, Inc., Carolina Trading Corporation, James I. Miller Tobacco Co., Inc., PMA Incorporated, The Tobacco Trading Corporation, and W.A. Adams Company.

Honda Motor Corporation, Ltd. is the parent corporation of, or owns 10 percent or more of the stock of, Petitioner American Honda Motor Co., Inc.

Honda Trading Corporation and American Honda Motor Company, Inc. are the parent corporations of, or own 10 percent or more of the stock of, Petitioner Honda Trading America Corporation.

BP America & BP, PLC is the parent corporation of, or owns 10 percent or more of the stock of, Petitioner BP Chemicals, Inc.

Harvest States Cooperative and Petitioner Cargill, Incorporated are the parent corporations of, or own 10 percent or more of the stock of, Petitioner Tacoma Export Marketing Company.

Petitioner Farmland Industries, Inc. has no parent corporation, and there is no publicly held company that owns 10 percent or more of its stock. Petitioner Farmland Industries, Inc. is the parent corporation of, or owns 10 percent or more of the stock of, the following other Petitioners: Farmland Foods, Inc., Tradigrain, Inc., and Tradigrain, S.A., Geneva.

Petitioner Farmland Industries, Inc. and Hydro Agri Phosphates, Inc. are the parent corporations of, or own 10 percent or more of the stock of, Petitioner Farmland Hydro, L.P.

FMR Corp. is the parent corporation of, or owns 10 percent or more of the stock of, Petitioner Lexmark International, Inc.

The Boeing Company is the parent corporation of, or owns 10 percent or more of the stock of, Petitioner McDonnell Douglas Corporation.

Pharmacia Corporation is the parent corporation of, or owns 10 percent or more of the stock of, Petitioner Monsanto Company.

Caterpillar, Inc. is the parent corporation of, or owns 10 percent or more of the stock of, Petitioner Solar Turbines Incorporated.

Imerys USA, Inc. and Imerys S.A. are the parent corporations of, or own 10 percent or more of the stock of, Petitioner ECC International, Inc.

Imerys Pigments, Inc., Imerys USA, Inc. and Imerys S.A. are the parent corporations of, or own 10 percent or more of the stock of, Petitioner ECCA Calcium Products, Inc.

Koch Industries, Inc. is the parent corporation of, or owns 10 percent or more of the stock of, the following Petitioners: Koch Carbon, Inc. and Koch Refining Company.

Primex Technologies, Inc. is the parent corporation of, or owns 10 percent or more of the stock of, Petitioner Physics International Company.

Sterling Chemicals Holdings, Inc. is the parent corporation of, or owns 10 percent or more of the stock of, Petitioner Sterling Chemicals, Inc.

IMC Global, Inc. is the parent corporation of, or owns 10 percent or more of the stock of, Petitioner IMC Global Operations, Inc.

Petitioner IMC Global Operations, Inc. and Phosphate Resources Limited Partnership are the parent corporations of, or own 10 percent or more of the stock of, Petitioner IMC-Agrico Company.

The following Petitioners have no parent corporations, and there is no publicly held company that owns 10 percent or more of their stock: General Electric Company, CBS Corporation, Continental Grain Company, ContiQuincy

Bunge, L.L.C., Olin Corporation, and International Multifoods Corporation.

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PETITION FOR A WRIT OF CERTIORARI

This case presents the question whether Petitioners are entitled to interest on Harbor Maintenance Tax refunds required by this Court's ruling, in *United States v. United States Shoe Corp.*, 523 U.S. 360 (1998), that the tax is unconstitutional when assessed on exports. On remand in *United States Shoe,* the U.S. Court of Appeals for the Federal Circuit recently addressed the same question and denied the taxpayer's interest claim. *See United States Shoe Corp. v. United States*, 296 F.3d 1378 (Fed. Cir. 2002) (hereinafter "*United States Shoe II*"). A petition for a writ of certiorari was filed in *United States Shoe II* on February 19, 2003. Because *United States Shoe II* is the lead case on Harbor Maintenance Tax interest issues, Petitioners respectfully request the Court to hold this petition pending disposition of *United States Shoe II* and then grant this petition, vacate the Federal Circuit's judgment in this case, and remand this case to the Federal Circuit for further proceedings consistent with *United States Shoe II.*

OPINIONS BELOW

The opinion of the Federal Circuit (Pet. App. 1a-11a) is reported at 301 F.3d 1299. The opinions of the U.S. Court of International Trade (Pet. App. 16a-37a) are not reported.

JURISDICTION

The Federal Circuit's final judgment was entered on August 26, 2002. (Pet. App. 3a.) Petitioners filed a timely petition for rehearing *en banc* on October 9, 2002, which the Federal Circuit denied on November 4, 2002. (*Id.* at 38a-41a.) On January 16, 2003, the Chief Justice granted an application for extension of time to file this petition on or before March 4, 2003. This Court has jurisdiction under 28 U.S.C. § 1254(1).

STATUTORY AND CONSTITUTIONAL PROVISIONS INVOLVED

The Appendix (Pet. App. 42a-47a) sets forth verbatim the following statutory and constitutional provisions: 19 U.S.C. § 1505; 28 U.S.C. §§ 1581(a) and 2644; U.S. CONST. art. I, § 9, cl.5; and U.S. CONST. amend. V.

STATEMENT OF THE CASE

A. The Harbor Maintenance Tax and the *United States Shoe* Test Case

In 1986, Congress enacted the Harbor Maintenance Tax ("HMT") as a means of raising revenues to fund the development and maintenance of the nation's harbors. In pertinent part, the tax was paid by exporters that shipped commercial cargo from coastal ports in the mainland United States. The amount of tax owing was a fixed percentage of the value of the export cargo. *See* 26 U.S.C. §§ 4461-62. The U.S. Customs Service administered and enforced the HMT statute.

Beginning in the mid-1990s, thousands of exporters, including the Petitioners in this case, filed separate civil actions in the United States Court of International Trade ("CIT"), challenging the tax on the ground that it violated the Export Clause of the U.S. Constitution, which provides that "[n]o Tax or Duty shall be laid on articles exported from any State." U.S. CONST. art. I, § 9, cl.5. The remedies requested in these suits included refunds of taxes previously paid, plus interest.

The CIT chose one of these numerous similarly situated cases as a "test case" that would "proceed first to final determination to serve as a test of the right of recovery in the other actions." U.S. CIT R. 84(b) (defining test case). That case was *United States Shoe Corp. v. United States*, 907 F.

Supp. 408 (Ct. Int'l Trade 1995). Under its test case procedure, the CIT stayed all other export HMT cases, including those filed by Petitioners, pending a decision in *United States Shoe*. (*See* Pet. App. 56a-73a.)

Sitting as a three-judge court in *United States Shoe*, the CIT held that the HMT was an unconstitutional tax on exports. *United States Shoe*, 907 F. Supp. 408. The government appealed the CIT's ruling to the Federal Circuit. Sitting as a five-judge panel, the Federal Circuit affirmed. *United States Shoe Corp. v. United States*, 114 F.3d 1564 (Fed. Cir. 1997). The government then filed a petition for a writ of certiorari seeking review of the Federal Circuit's ruling in this Court. This Court granted the petition and unanimously affirmed. *United States v. United States Shoe Corp.*, 523 U.S. 360 (1998). This Court's decision in *United States Shoe* conclusively determined that Congress violated the constitutional rights of Petitioners and other taxpayers by exacting the tax monies at issue.

B. The CIT's Refund Claim Procedure

This Court's decision in *United States Shoe* required the CIT to refund hundreds of millions of dollars in tax money to thousands of taxpayers. The CIT adopted a procedure that utilized a standard form stipulated judgment to implement the refunds in pending HMT court cases. The form judgment ordered the government to pay the taxpayer a refund of a principal amount stipulated by the parties. The form judgment did not, however, require the government to pay interest at that time. Under the terms of the form judgment, determination of entitlement to interest was deferred pending resolution of *IBM Corp. v. United States*, a separate test case that addressed entitlement to interest. (*See* Pet. App. 49a.)

Petitioners followed the claims procedure required by the CIT, entering into the stipulated judgments that ordered the government to refund principal but deferred resolving the question of interest. (*See, e.g.*, Pet. App. 48a-55a.) The government subsequently paid Petitioners the refunds of principal in the amounts stipulated, without interest.

C. Petitioners' Motions to Amend Their Judgments

After Petitioners had signed their stipulated judgments and received their refunds of tax principal, the Federal Circuit decided two HMT cases that fundamentally affected their interest rights. The first was *Swisher Int'l, Inc. v. United States*, 205 F.3d 1358 (Fed. Cir. 2000), which established the legal premise for Petitioners' entitlement to interest under two statutes – 28 U.S.C. § 2644 and 19 U.S.C. § 1505. The second was *IBM Corp. v. United States*, 201 F.3d 1367 (Fed. Cir. 2000), which was the interest case referred to in Petitioners' stipulated judgments. The Federal Circuit's *IBM* decision supported Petitioner's entitlement to interest under 28 U.S.C. § 2644 but did not address additional entitlements to interest that Petitioners believed they had under the Takings Clause of the Fifth Amendment and the Export Clause of Article I.

Following the Federal Circuit's decisions in *Swisher* and *IBM,* Petitioners moved to amend their judgments to provide expressly for interest under 19 U.S.C. § 1505, 28 U.S.C. § 2644, the Takings Clause, and the Export Clause. Petitioners argued, *inter alia,* that the intervening Federal Circuit decisions justified amendment of their judgments, and

that interest was required as a matter of law. The CIT denied the motions to amend.[1]

D. The Federal Circuit's Designation of This Case and *United States Shoe II* As Companion Cases

Petitioners appealed to the Federal Circuit. At the government's request, the Federal Circuit designated this case and *United States Shoe II* as "companion cases." (Pet. App. 14a; *see also supra* at 1 (describing *United States Shoe II*).) Like the present case, *United States Shoe II* specifically addresses the question whether the government owes interest under 19 U.S.C. § 1505, the Takings Clause, and the Export Clause. Because the issues in this case substantially overlap with those in *United States Shoe II,* the Federal Circuit held argument in both cases on the same day, and before the same panel. (Pet. App. 14a.)

E. The Federal Circuit's Ruling in *United States Shoe II*

The Federal Circuit issued its decision in *United States Shoe II* while the appeal in the present case was still pending. Among other things, the court held that no interest was owing under 19 U.S.C. § 1505, the Takings Clause, or the Export Clause. *United States Shoe II*, 296 F.3d at 1382-85.[2]

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[1] All of the Petitioners moved to amend their judgments after they were final, and many of the Petitioners filed additional, earlier, motions to amend their judgments at the time they were interlocutory. The CIT issued orders denying both types of motions. (Pet. App. 16a-37a.)

[2] The Federal Circuit also denied interest under 28 U.S.C. § 2644 in *United States Shoe II*, because section 2644 only

(Footnote cont'd on next page)

F. The Federal Circuit's Reliance on *United States Shoe II* in the Ruling Denying Interest in This Case

The Federal Circuit then issued its decision in the present case, which denied Petitioners' interest claims. The Federal Circuit's opinion focused primarily upon 28 U.S.C. § 2644. The court held that no interest was owing, because section 2644 only requires interest if the CIT has jurisdiction under 28 U.S.C. § 1581(a), and Petitioners' stipulated judgments stated that the CIT had jurisdiction instead under 28 U.S.C. § 1581(i). (Pet. App. 10a.)

The panel then reached the other statutory and constitutional issues presented. The panel denied interest under 19 U.S.C. § 1505, the Takings Clause and the Export

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(Footnote cont'd from previous page.)

requires interest if the CIT has jurisdiction under 28 U.S.C. § 1581(a), and the CIT had jurisdiction in that case instead under 28 U.S.C. § 1581(i). *United States Shoe II*, 296 F.3d at 1382. Section 2644 also provides no interest remedy for the thousands of other taxpayers who have filed administrative claims for HMT refunds pursuant to a procedure that Customs adopted in 2001. *See* 67 Fed. Reg. 31,948 (2002). Those claims will be resolved administratively by Customs, not by the CIT, and section 2644 only requires payment of interest if a civil action is initiated in the CIT through the filing of a summons. 28 U.S.C. § 2644; *see also* U.S. CIT R. 3(a)(1) (describing initation of civil action through filing of summons). In addition, even in the limited number of court cases in which section 2644 applies, that statute only provides for partial interest, running from the date of the summons forward, and does not require interest from the date Customs receives payment to the date of the summons. *See* 28 U.S.C. § 2644.

Clause, relying exclusively on the grounds stated in *United States Shoe II*:

> As to Hohenberg's alternative arguments that it is entitled to interest on HMT refunds under 19 U.S.C. § 1505, the Export Clause, and the Takings Clause, this court has recently held in *United States Shoe Corp. v. United States*, No. 98-1574 (Fed. Cir. July 23, 2002), that neither the Constitution nor any statute mandates the payment of interest. Accordingly, these provisions do not give Hohenberg any entitlement to pre-summons interest on HMT refunds.

(Pet. App. 10a-11a.)

The Federal Circuit denied rehearing *en banc* (Pet. App. 39a-41a), and this petition followed.

REASONS FOR GRANTING THE PETITION

The Court should hold this petition pending disposition of *United States Shoe II* and then grant this petition, vacate the Federal Circuit's judgment in this case, and remand this case to the Federal Circuit for further proceedings consistent with *United States Shoe II*. That course of action is warranted because this case raises many of the same issues as *United States Shoe II*, and Petitioners accordingly are among the thousands of HMT taxpayers that would be directly affected by a decision of this Court in *United States Shoe II*.

The Federal Circuit recognized the substantial overlap between this case and *United States Shoe II* by designating the cases as "companion cases" and granting the government's request to hear oral argument in both appeals on the same date, and before the same panel. (Pet. App. 12a-15a.) In this case, there are three specific questions of substantial importance that are identical to questions

presented in the pending petition for a writ of certiorari in *United States Shoe II*. *See* Petition for a Writ of Certiorari, *United States Shoe Corp. v. United States* (filed February 19, 2003) (hereinafter "*U.S. Shoe II* Pet."). *First*, both cases address whether 19 U.S.C. § 1505 requires the government to pay interest on export HMT refunds. The Federal Circuit's prior ruling in *United States Shoe II* was the court's sole justification for denying Petitioners' rights to section 1505 interest in this case. (Pet. App. 10a-11a (citing *United States Shoe II*).) The petition for a writ of certiorari in *United States Shoe II* explains why the Federal Circuit's misapplication of section 1505 justifies this Court's intervention. *See United States Shoe II* Pet. at 2, 10, 14-18.

Second, both cases present the question whether the Export Clause of Article I requires the government to pay interest on export HMT refunds. The Federal Circuit denied Petitioners' rights to interest under the Export Clause based solely on the court's ruling in *United States Shoe II*. (Pet. App. 11a (citing *United States Shoe II*).) The petition for a writ of certiorari in *United States Shoe II* demonstrates that although it is unnecessary to reach the constitutional question, the Export Clause requires payment of interest, and the Federal Circuit's contrary conclusion demands this Court's review. *See United States Shoe II* Pet. at 3, 11, 20-23.

Third, both cases address whether the Takings Clause of the Fifth Amendment requires the government to pay interest on export HMT refunds. The Federal Circuit again relied on its opinion in *United States Shoe II* to deny Petitioners' claims. (Pet. App. 11a (citing *United States Shoe II*).) The petition for a writ of certiorari in *United States Shoe II* argues that in the context of the HMT litigation, constitutional entitlements to interest include a right to interest under the Takings Clause, and that this Court should review the Federal

Circuit's erroneous ruling nullifying that right. *See United States Shoe II* Pet. at 4, 11, 25-26.

CONCLUSION

Because of the substantial overlap between this case and *United States Shoe II*, the Court should hold this petition pending disposition of *United States Shoe II* and then grant this petition, vacate the Federal Circuit's judgment in this case, and remand this case to the Federal Circuit for further proceedings consistent with *United States Shoe II*.

Respectfully submitted,

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Counsel for Petitioners

February 28, 2003

APPENDIX A

United States Court of Appeals for the Federal Circuit

01-1460, -1461, -1462, -1463, -1464, -1465, -1466, -1467, -1468, -1469, -147e0, -1471, -1472, -1473, -1474, -1475, -1476, -1477, -1478, -1479, -1480, -1481, -1482, -1483, -1484, -1485, -1486, -1487, -1488, -1489, -1490, -1491, -1492, -1493, -1494, -1495, -1496,-1497, -1498, -1499, -1500, -1501, -1502, -1503, -1504, -1505, -1506, -1507, -1508, -1509,-1510, -1511, -1512, -1513, -1514, -1515, -1516, -1517, -1518, -1519, -1520, -1521, -1522,-1523, -1524, -1525, -1526, -1527, -1528, -1529, -1530, -1531, -1532, -1533, -1534, -1535,-1536, -1537, -1538, -1539, -1540, -1541, -1542, and -1543.

HOHENBERG BROS. COMPANY, A.C. MONK AND COMPANY, INC., THE AUSTIN TOBACCO COMPANY, INC., CARGILL AMERICAS, INC., CARGILL CITRO-AMERICA, INC., CARGILL FERTILIZER, INC., CARGILL, INCORPORATED, CAROLINA LEAF TOBACCO COMPANY, INC., DIBRELL BROTHERS, INC., EXCEL CORPORATION, GENERAL ELECTRIC COMPANY, K.R. EDWARDS LEAF TOBACCO COMPANY, INC., MACLIN-ZIMMER-MCGILL TOBACCO CO., INC., MONK-AUSTIN INTERNATIONAL, INC., THORPE-GREENVILLE EXPORT TOBACCO CO., INC., T.S. RAGSDALE COMPANY, INC., UNIVERSAL LEAF TOBACCO COMPANY, INC., U.S. STEEL INTERNATIONAL, INC., U.S. STEEL MINING CO., INC., USX CORPORATION, USX ENGINEERS & CONSULTANTS, INC., BASF CORPORATION, BASF MAGNETICS CORPORATION, AKZO NOBEL CHEMICALS, INC., REYNOLDS METALS COMPANY, ZENECA INC., ISK BIOSCIENCES CORPORATION, ARCHER-DANIELS-MIDLAND COMPANY,

ADM/GROWMARK RIVER SYSTEMS, INC., VALLEY GRAIN PRODUCTS, INC., THE COLEMAN COMPANY, HILL'S PET NUTRITION, INC., STANDARD COMMERICAL TOBACCO COMPANY, INC., CAROLINA TRADING CORPORATION, JAMES I. MILLER TOBACCO CO., INC., PMA INCORPORATED, THE TOBACCO TRADING CORPORATION, W.A. ADAMS COMPANY, AMERICAN HONDA MOTOR CO., INC., HONDA TRADING AMERICA CORPORATION, BP CHEMICALS, INC., CBS CORPORATION, CONTINENTAL GRAIN COMPANY, CONTIQUINCY BUNGE, L.L.C., TACOMA EXPORT MARKETING COMPANY, FARMLAND INDUSTRIES, INC., FARMLAND FOODS, INC., FARMLAND HYDRO, L.P., TRADIGRAIN, INC., TRADIGRAIN, S.A., GENEVA, LEXMARK INTERNATIONAL, INC., MCDONNELL DOUGLAS CORPORATION, MONSANTO COMPANY, SOLAR TURBINES INCORPORATED, EEC INTERNATIONAL, INC., ECCA CALCIUM PRODUCTS, INC., KOCH CARBON, INC., KOCH REFINING COMPANY, OLIN CORPORATION, PHYSICS INTERNATIONAL COMPANY, STERLING CHEMICALS, INC., IMC GLOBAL OPERATIONS, INC., IMC-AGRICO COMPANY, AND INTERNATIONAL MULTIFOODS CORPORATION

Plaintiffs-Appellants,

v.

UNITED STATES,

Defendant-Appellee.

Daniel G. Jarcho, McKenna & Cuneo, L.L.P., of Washington, DC, argued for plaintiffs-appellants. With him on the brief were Peter Buck Feller and Joseph F. Dennin.

Jeffrey A. Belkin, Trial Attorney, Commercial Litigation Branch, Civil Division, Department of Justice, of Washington, DC, argued for defendant-appellee. With him

on the brief were Robert D. McCallum, Jr., Assistant Attorney General; David M. Cohen, Director; Jeanne E. Davidson, Deputy Director; and Todd A. Hughes, Assistant Director. Of counsel on the brief was Richard K. McManus, Office of the Chief Counsel, United States Customs Service, of Washington, DC.

Appealed from: United States Court of International Trade

Judge Jane A. Restani

Decided: August 26, 2002

Before MAYER, Chief Judge, RADER, and BRYSON, Circuit Judges. RADER, Circuit Judge.

In the context of refunds of the Harbor Maintenance Tax, the United States Court of International Trade denied Hohenberg Bros. Co.'s motion to amend the court's consent judgments. Because the Court of International Trade did not abuse its discretion in denying the motion, this court affirms.

I.

These consolidated cases involve the refund of the Harbor Maintenance Tax (HMT) to certain exporters. The HMT, enacted as part of the Water Resources Development Act of 1986, 26 U.S.C. §§ 4461-4462, is an ad valorem tax on shipments of commercial cargo. Several thousand exporters challenged the constitutionality of the HMT as applied to exporters. In a test case, a three-judge panel of the Court of International Trade held that the HMT, as applied to exports, violated the Export Clause of the United States constitution. United States Shoe Corp. v. United States, 907 F. Supp. 408 (Ct. Int'l Trade 1995). On appeal, a five-judge panel of this court agreed. United States Shoe Corp. v. United States, 114 F.3 1564 (Fed. Cir. 1997). The

Supreme Court affirmed. United States v. United States Shoe Corp., 523 U.S. 360 (1998).

After the Supreme Court affirmed the unconstitutionality of the HMT on exports, the Court of International Trade adopted a procedure for Customs to provide HMT refunds. In compliance with the procedure, each claimant executed a consent judgment as prescribed by the Court of International Trade. The consent judgment entitled the exporters to an immediate HMT refund within the two-year statute of limitations period for suits filed under 28 U.S.C. § 1581(i).

Concurrently, the Court of International Trade developed a test case procedure to resolve the remaining issues surrounding the HMT, including the award of prejudgment interest. The court selected International Business Machines Corp. v. United States, No. 94-10-00625, 1998 WL 325156 (Ct. Int'I Trade), as the test case to determine the eligibility of HMT refunds for prejudgment interest. In that case, IBM had filed its action under § 1581(i).

The Court of International Trade entered Hohenberg's consent judgment on March 30, 1999. Neither party appealed that judgment. Consequently, Hohenberg immediately received a refund of its HMT principal from Customs. That judgment, as well as the consent judgments executed by other exporters, noted the court's jurisdiction under 28 U.S.C. § 1581(i), consistent with that court's jurisdictional rulings at the time. The judgments also provided for interest on the principal if the appellate proceedings in the IBM test case found HMT refunds entitled to interest. In International Business Machines Corp. v. United States, 201 F.3d 1367, 1374 (Fed. Cir. 2000) (IBM), this court determined that no statute provided an interest award arising out of a judgment under 28 U.S.C. § 1581(i).

Subsequently, on October 13, 2000, Hohenberg, along with those exporters who had received immediate HMT refunds under the consent judgments and who had initially

challenged the HMT through the refund-request-and-protest process identified in Swisher International, Inc. v. United States, 205 F.3d 1358 (Fed. Cir. 2000),[1] filed a motion before the Court of International Trade seeking to amend those judgments. Specifically, Hohenberg sought to amend the March 30, 1999 consent judgment to invoke the jurisdiction of that court under 28 U.S.C. § 1581(a) rather than 28 U.S.C. § 1581(i). Further, Hohenberg sought an award of post-summons interest under 28 U.S.C. § 2644, the interest provision applicable to awards under § 1581(a) jurisdiction. On December 28, 2000, the Court of International Trade denied that motion.

On March 21, 2001, Hohenberg renewed its motion to amend the March 30, 1999 judgment under Court of International Trade Rules (RCIT) 59(e) and 60(b) to acquire jurisdiction in the Court of International Trade under § 1581(a). Hohenberg additionally sought an award of post-summons interest under 28 U.S.C. § 2644, and an award of pre-summons interest under 19 U.S.C. § 1505, or in the alternative, under the Constitution of the United States. The trial court denied that motion on May 10, 2001. The court acknowledged that "[a]s in Swisher, [Hohenberg] perfected § 1581 (a) protest denial jurisdiction." Nonetheless, the Court of International Trade held that the judgment was not jurisdictionally defective and declined to amend the judgment. In so holding, the court reasoned that it had jurisdiction in this matter under either § 1581(a) or (i).

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[1] In Swisher International, Inc. v. United States, 205 F.3d 1358, 1364-65 (Fed. Cir. 2000), the exporter had initially challenged the HMT through the refund-request-and-protest process. This court found jurisdiction under 28 U.S.C. § 1581(a) for properly protested HMT refund claims.

Hohenberg timely appealed to this court, which has exclusive jurisdiction pursuant to 28 U.S.C. § 1295(a)(5).

On appeal, Hohenberg argues that this court's decision in Swisher requires the Court of International Trade to amend the jurisdictional statement in the judgment. Hohenberg asserts that because jurisdiction of the court was proper under § 1581(a), Hohenberg is entitled to post-summons interest on HMT refunds under 28 U.S.C. § 2644. Hohenberg further cites IBM as confirming that § 2644 requires an award of interest in this case. Additionally, Hohenberg contends that because the HMT is treated as a customs duty under 26 U.S.C. § 4462(f)(1) for administration and enforcement purposes, Hohenberg is entitled to pre-summons interest on HMT refunds pursuant to 19 U.S.C. § 1505. Alternatively, Hohenberg argues that the Export Clause mandates payment of interest on HMT refunds. Finally, Hohenberg argues that the government's retention of interest on the unconstitutional HMT amounts to a Fifth Amendment taking of private property.

II.

This court reviews a refusal by the Court of International Trade to grant relief on a motion under RCIT 59 or 60 for an abuse of discretion. Mass. Bay Transp. Auth. v. United States, 254 F.3d 1367, 1378 (Fed. Cir. 2001). To constitute an abuse of discretion, the trial court's decision must be clearly unreasonable, arbitrary or fanciful, or based on clearly erroneous findings of fact or erroneous conclusions of law. Cybor Corp. v. FAS Techs., Inc., 138 F.3d 1448, 1460 (Fed. Cir. 1998) (en banc). This court reviews legal determinations by the Court of International Trade de novo. Fla. Sugar Mktg. & Terminal Ass'n v. United States, 220 F.3d 1331, 1333 (Fed. Cir. 2000).

Courts interpret a consent judgment according to general principles of contract law. Diversey Lever, Inc. v. Ecolab, Inc., 191 F.3d 1350, 1352 (Fed. Cir. 1999); Novamedix, Ltd.

v. NDM Acquisition Corp., 166 F.3d 1177, 1180 (Fed. Cir. 1999). Furthermore, "[t]he scope of a consent decree is limited to its terms and . . . its meaning should not be strained." Foster v. Hallco Mfg. Co., 947 F.2d 469, 481, 20 USPQ2d 1241, 1250 (Fed. Cir. 1991) (citing United States v. Armour & Co., 402 U.S. 673, 681 (1971)). Hence, as in a contract, the terms of the judgment bind its parties.

In this case, the Court of International Trade entered on March 30, 1999, a consent judgment (Judgment) executed by Hohenberg's counsel and the government's attorneys. The relevant paragraphs of the judgment are:

> 2. The court has jurisdiction under 28 U.S.C. § 1581(i) (1994).
>
> . . . .
>
> 6. Interest shall be paid on the refunded amounts in accordance with a schedule set by the court should appellate court proceedings in International Business Machines Corp. v. United States, Court No. 94-10-00625, finally resolve that interest is owing on HMT payments.
>
> . . . .
>
> 9. Upon entry of judgment, plaintiff releases, waives, and abandons all claims against the defendant, its officers, agents, and assigns, arising out of all HMT export payments for the non-severed quarters identified in the attached Harbor Maintenance Tax Payment Report, including, but not limited to, all claims for costs, attorneys fees, expenses, compensatory damages, and exemplary damages. Defendant releases . . . .

Hence, the judgment states that the Court of International Trade had jurisdiction under § 1581(i).[2] Judgment ¶ 2. The judgment also expressly states that interest on the refunded amounts depends on the outcome of IBM, the § 1581(i) interest test case. Id. ¶ 6. Moreover, under ¶ 9 of the judgment, Hohenberg waived all future claims. Id. ¶ 9.

In the § 1581(i) interest test case, the Court of International Trade entered judgment for IBM and ordered a refund of the principal. 1998 WL 325156, at *1. The court also adopted its earlier position awarding interest under 28 U.S.C. § 2411, a provision for interest on income tax overpayments. Id. On appeal, the Federal Circuit reversed the Court of International Trade's interest award. IBM, 201 F.3d at 1369. In IBM, this court held that the United States is

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[2] 28 U.S.C. § 1581(i) states:

> In addition to the jurisdiction conferred upon the Court of International Trade by subsections (a)-(h) of this section and subject to the exception set forth in subsection (j) of this section, the Court of International Trade shall have exclusive jurisdiction of any civil action commenced against the United States, its agencies, or its officers, that arises out of any law of the United States providing for -- (1) revenue from imports or tonnage; (2) tariffs, duties, fees, or other taxes on the importation of merchandise for reasons other than the raising of revenue; (3) embargoes or other quantitative restrictions on the importation of merchandise for reasons other than the protection of the public health or safety; or (4) administration and enforcement with respect to the matters referred to in paragraphs (1)-(3) of this subsection and subsections (a)-(h) of this section.

liable for interest only in the event of a clear statutory waiver of sovereign immunity. Id. (citing Library of Cong. v. Shaw, 478 U.S. 310, 314 (1986)). This court also found that neither § 2411, nor any statutory provision of the customs laws, provides an express waiver of sovereign immunity sufficient to authorize interest on HMT refunds. Id. at 1374. In the present case, because the consent judgment unambiguously rests on jurisdiction under § 1581(i) and because interest on the refunded amounts is dependent on the outcome of IBM, Hohenberg is not entitled to any interest on its HMT refunds.

Hohenberg now claims that this court's decision in Swisher requires the Court of International Trade to amend the judgment to provide that jurisdiction in the court would have been proper under § 1581(a),[3] instead of § 1581(i). In Swisher, this court held that jurisdiction arises under § 1581(a) if a taxpayer has exhausted applicable administrative remedies, and timely filed suit in the Court of International Trade. Swisher, 205 F.3d at 1364-65. Because Hohenberg had initially challenged the HMT through the refund-request-and-protest process identified in Swisher, Hohenberg seeks to amend its consent judgment to assert jurisdiction under § 1581(a).

In its original complaint, Hohenberg had asserted jurisdictional bases under §§ 1581(a) and (i) in the alternative, but ultimately executed the consent judgment with the § 1581(i) jurisdictional statement. As the Court of International Trade noted, Hohenberg could have preserved its claim under § 1581(a) by not signing the consent

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[3] 28 U.S.C. § 1581(a) states: "The Court of International Trade shall have exclusive jurisdiction of any civil action commenced to contest the denial of a protest, in whole or in part, under section 515 of the Tariff Act of 1930."

judgment. Instead, Hohenberg chose to rely solely on its rights under § 1581(i) despite ongoing litigation as to § 1581(a) in Swisher. By voluntarily entering the consent judgment, Hohenberg benefited by receiving immediate refund of its HMT payments. Furthermore, Hohenberg did not seek more flexible language on the interest provision or on the jurisdiction in the consent judgment. Nor did Hohenberg appeal the judgment or the jurisdictional basis of the judgment until after this court issued its decision in Swisher.

As the government argues, all parties executed the judgment to gain immediate HMT refunds. By executing the judgment, Hohenberg also expressly waived all future claims arising out of its HMT export payments against the government. Judgment ¶ 9. In short, Hohenberg chose to receive immediate compensation and took a gamble on the outcome of IBM. Because parties to the consent judgment are bound by the terms of the judgment, the Court of International Trade did not abuse its discretion by holding Hohenberg to its bargain and refusing to amend the judgment.

Hohenberg asserts that because jurisdiction of the Court of International Trade was proper under § 1581(a), Hohenberg is entitled to post-summons interest on HMT refunds pursuant to 28 U.S.C. § 2644. Hohenberg further cites IBM as confirming that § 2644 requires an award of interest in this case. In IBM, this court cited 28 U.S.C § 2644 as a possible basis for an interest award, but concluded that that section did not apply in that case because IBM's action was filed under 1581(i). IBM, 201 F.3d at 1373. Thus, when read together with Swisher, IBM allows interest to those who invoked jurisdiction under § 1581(a). As discussed above, however, the .Court of International Trade did not abuse its discretion by refusing to amend the judgment to assert jurisdiction under § 1581(a). Hence, Hohenberg is not

entitled to post-summons interest on HMT refunds pursuant to 28 U.S.C. § 2644.

As to Hohenberg's alternative arguments that it is entitled to interest on HMT refunds under 19 U.S.C. § 1505, the Export Clause, and the Takings Clause, this court has recently held in United States Shoe Corp. v. United States, No. 98-1574 (Fed. Cir. July 23, 2002), that neither the Constitution nor any statute mandates the payment of interest. Accordingly, these provisions do not give Hohenberg any entitlement to pre-summons interest on HMT refunds. In sum, the Court of International Trade did not abuse its discretion in denying Hohenberg's motion to amend the court's March 30, 1999 consent judgment.

COSTS

Each party shall bear its own costs.

AFFIRMED.

APPENDIX B

NOTE: Pursuant to Fed. Cir. R. 47.6 this order is not citable as precedent. It is a public order.

United States Court of Appeals for the Federal Circuit

98-1574

UNITED STATES SHOE CORPORATION

Plaintiff-Appellee,

v.

UNITED STATES,

Defendant-Appellant.

01-1460, -1461, -1462, -1463, -1464, -1465, -1466, -1467, -1468, -1469, -1470, -1471, -1472, -1473, -1474, -1475, -1476, -1477, -1478, -1479, -1480, -1481, -1482, -1483, -1484, -1485, -1486, -1487, -1488, -1489, -1490, -1491, -1492, -1493, -1494, -1495, -1496,-1497, -1498, -1499, -1500, -1501, -1502, -1503, -1504, -1505, -1506, -1507, -1508, -1509,-1510, -1511, -1512, -1513, -1514, -1515, -1516, -1517, -1518, -1519, -1520, -1521, -1522,-1523, -1524, -1525, -1526, -1527, -1528, -1529, -1530, -1531, -1532, -1533, -1534, -1535,-1536, -1537, -1538, -1539, -1540, -1541, -1542, and -1543.

HOHENBERG BROS. COMPANY, A.C. MONK AND COMPANY, INC., THE AUSTIN TOBACCO COMPANY, INC., CARGILL AMERICAS, INC., CARGILL CITRO-AMERICA, INC., CARGILL FERTILIZER, INC., CARGILL, INCORPORATED, CAROLINA LEAF TOBACCO COMPANY, INC., DIBRELL BROTHERS, INC., EXCEL CORPORATION, GENERAL ELECTRIC COMPANY, K.R. EDWARDS LEAF TOBACCO COMPANY, INC., MACLIN-ZIMMER-MCGILL

TOBACCO CO., INC., MONK-AUSTIN INTERNATIONAL, INC., THORPE-GREENVILLE EXPORT TOBACCO CO., INC., T.S. RAGSDALE COMPANY, INC., UNIVERSAL LEAF TOBACCO COMPANY, INC., U.S. STEEL INTERNATIONAL, INC., U.S. STEEL MINING CO., INC., USX CORPORATION, USX ENGINEERS & CONSULTANTS, INC., BASF CORPORATION, BASF MAGNETICS CORPORATION, AKZO NOBEL CHEMICALS, INC., REYNOLDS METALS COMPANY, ZENECA INC., ISK BIOSCIENCES CORPORATION, ARCHER-DANIELS-MIDLAND COMPANY, ADM/GROWMARK RIVER SYSTEMS, INC., VALLEY GRAIN PRODUCTS, INC., THE COLEMAN COMPANY, HILL'S PET NUTRITION, INC., STANDARD COMMERICAL TOBACCO COMPANY, INC., CAROLINA TRADING CORPORATION, JAMES I. MILLER TOBACCO CO., INC., PMA INCORPORATED, THE TOBACCO TRADING CORPORATION, W.A. ADAMS COMPANY, AMERICAN HONDA MOTOR CO., INC., HONDA TRADING AMERICA CORPORATION, BP CHEMICALS, INC., CBS CORPORATION, CONTINENTAL GRAIN COMPANY, CONTIQUINCY BUNGE, L.L.C., TACOMA EXPORT MARKETING COMPANY, FARMLAND INDUSTRIES, INC., FARMLAND FOODS, INC., FARMLAND HYDRO, L.P., TRADIGRAIN, INC., TRADIGRAIN, S.A., GENEVA, LEXMARK INTERNATIONAL, INC., MCDONNELL DOUGLAS CORPORATION, MONSANTO COMPANY, SOLAR TURBINES INCORPORATED, EEC INTERNATIONAL, INC., ECCA CALCIUM PRODUCTS, INC., KOCH CARBON, INC., KOCH REFINING COMPANY, OLIN CORPORATION, PHYSICS INTERNATIONAL COMPANY, STERLING CHEMICALS, INC., IMC GLOBAL OPERATIONS, INC.,

IMC-AGRICO COMPANY, AND INTERNATIONAL MULTIFOODS CORPORATION

Plaintiffs-Appellants,

v.

UNITED STATES,

Defendant-Appellee.

ON MOTION

Before LOURIE, Circuit Judge

ORDER

In its brief in United States Shoe Corporation v. United States, appeal 98-1574, in the Statement of Related Cases, the United States suggests that that case should be heard consecutively by the same merits panel that hears the other above-captioned appeals.

Upon consideration thereof,

IT IS ORDERED THAT:

(1) The cases will be treated as companion cases and will be heard consecutively by the same merits panel.

(2) A copy of this order shall be transmitted to the merits panel.

FEB 19 2002
Date

/s/
Alan D. Lourie
Circuit Judge

cc: Harvey A. Isaacs, Esq.
Peter Buck Feller, Esq.
Jeffrey A. Belkin, Esq.
John J. Galvin, Esq.
John M. Peterson, Esq.
Barry E. Cohen, Esq.

FILED
U.S. COURT OF APPEALS FOR
THE FEDERAL CIRCUIT

FEB 19 2002

JAN HORBALY
CLERK

APPENDIX C

Slip Op. 00 - 172

UNITED STATES COURT OF INTERNATIONAL TRADE

HOHENBERG BROS. COMPANY, Plaintiff, v. THE UNITED STATES, Defendant.	:	Court No. 96-09-02074 and Court No. 95-04-00450
A. C. MONK AND COMPANY, INC., Plaintiff, v. THE UNITED STATES, Defendant.	:	Court No. 96-09-02014
THE AUSTIN TOBACCO COMPANY, INC., Plaintiff, v. THE UNITED STATES, Defendant.	:	Court No. 96-09-02141
CARGILL AMERICAS, INC., Plaintiff, v. THE UNITED STATES, Defendant.	:	Court No. 96-12-02808 and Court No. 97-06-00970

CARGILL CITRO-AMERICA, INC., Plaintiff, v. THE UNITED STATES, Defendant.	:	Court No. 97-08-01358
CARGILL FERTILIZER, INC., Plaintiff, v. THE UNITED STATES, Defendant.	:	Court No. 97-06-00969 and Court No. 95-04-00449
CARGILL, INCORPORATED, INC., Plaintiff, v. THE UNITED STATES, Defendant.	:	Court No. 95-04-00448 and Court No. 96-09-02073
CAROLINA LEAF TOBACCO COMPANY, INC., Plaintiff, v. THE UNITED STATES, Defendant.	:	Court No. 96-09-02024
DIBRELL BROTHERS, INC., Plaintiff, v. THE UNITED STATES, Defendant.	:	Court No. 96-09-02028

EXCEL CORPORATION,	:	
Plaintiff,	:	Court No. 95-04-00379
v.	:	
THE UNITED STATES,	:	
Defendant.	:	

GENERAL ELECTRIC COMPANY,	:	
Plaintiff,	:	Court No. 96-09-02126
v.	:	and
THE UNITED STATES,	:	Court No. 97-08-01360
Defendant.	:	

K.R. EDWARDS LEAF TOBACCO COMPANY, INC.,	:	
Plaintiff,	:	Court No. 96-09-02052
v.	:	
THE UNITED STATES,	:	
Defendant.	:	

MACLIN-ZIMMER-McGILL TOBACCO CO., INC.,	:	
Plaintiff,	:	Court No. 96-09-02057
v.	:	
THE UNITED STATES,	:	
Defendant.	:	

MONK-AUSTIN INTERNATIONAL, INC., Plaintiff, v. THE UNITED STATES, Defendant.	:	Court No. 96-09-02059
THORPE-GREENVILLE EXPORT TOBACCO CO., INC., Plaintiff, v. THE UNITED STATES, Defendant.	:	Court No. 96-09-02114
T.S. RAGSDALE COMPANY, INC., Plaintiff, v. THE UNITED STATES, Defendant.	:	Court No. 96-09-02083
UNIVERSAL LEAF TOBACCO COMPANY, INC., Plaintiff, v. THE UNITED STATES, Defendant.	:	Court No. 96-09-02118

U.S. STEEL INTERNATIONAL, INC.,	:	
Plaintiff,	:	Court No. 96-09-02115
v.	:	and
THE UNITED STATES,	:	Court No. 96-12-02820
Defendant.	:	

U.S. STEEL MINING CO., INC.,	:	
Plaintiff,	:	Court No. 96-09-02116
v.	:	and
THE UNITED STATES,	:	Court No. 96-12-02811
Defendant.	:	

USX CORPORATION,	:	
Plaintiff,	:	Court No. 96-09-02091
v.	:	
THE UNITED STATES,	:	
Defendant.	:	

USX ENGINEERS & CONSULTANTS, INC.,	:	
Plaintiff,	:	Court No. 96-09-02092
v.	:	
THE UNITED STATES,	:	
Defendant.	:	

[Motion to Amend Judgment Denied.]

Dated: December __, 2000

McKenna & Cuneo, L.L.P. (Peter Buck Feller and Daniel G. Jarcho) for moving plaintiffs.

David W. Ogden, Assistant Attorney General, David M. Cohen, Director, Commercial Litigation Branch, Civil

Division, United States Department of Justice (Jeffrey A. Belkin) for defendant.

OPINION

RESTANI, Judge: This matter is before the court on plaintiffs' motions to amend judgment. The captioned cases involve claims falling within the two-year statute of limitations for suits under 28 U.S.C. § 1581(i) (1994). The judgment for which amendment is sought is the form consent judgment developed for resolution of suits seeking refund of Harbor Maintenance Tax ("HMT") paid on exports. See U.S. Shoe Corp. v. United States, No. 98-126, 1998 WL 544680 (Ct. Int'l Trade Aug. 28, 1998); 26 U.S.C. § 4461, et seq. (1994). Such taxes were found to be unconstitutional in United States v. U.S. Shoe Corp., 523 U.S. 360, 366-70 (1998). Plaintiffs voluntarily entered into the judgments at issue, and payment of principal has been made thereon.

In IBM Corp. v. United States, 201 F.3d 1367, 1374 (Fed. Cir. 2000), petition for cert. filed, 69 U.S.L.W. 3259 (U.S. Sep. 28, 2000) (No. 00-482), the court found interest was not owing on such refunds made under this court's 28 U.S.C. § 1581(i) jurisdiction. In Swisher Int'l., Inc. v. United States, 205 F.3d 1358, 1364-65 (Fed. Cir.), cert. denied, 121 S. Ct. 624 (2000), the court found that 28 U.S.C. § 1581(a) jurisdiction existed for HMT refund claim denials that were properly protested. As in Swisher, these plaintiffs perfected § 1581(a) protest denial jurisdiction. Id. at 1361. Accordingly, plaintiffs seek amendment of the form judgments to recite § 1581(a) jurisdiction instead of § 1581(i) jurisdiction and rewording the interest provision thereof so that interest will be owed from date of summons

under 28 U.S.C. § 2644.[1] By its terms 28 U.S.C. § 2644 applies to § 1581(a) jurisdiction cases (challenge to denial of protest under section 515 of the Tariff Act of 1930), but not to § 1581(i) (residual jurisdiction) cases.[2]

First, contrary to plaintiffs' argument, the judgments are not jurisdictionally defective. It is clear that the court has jurisdiction in this matter under 28 U.S.C. § 1581, whether it is under subsection (a) or (i). Thus, the disposition of plaintiffs' claims via a consent judgment was proper and the court did not lack jurisdiction to enter the judgment. Second, prior to the Swisher decision it was settled law that § 1581(i) jurisdiction did not exist if § 1581(a) jurisdiction provided an adequate remedy, whether or not a plaintiff availed himself of the underlying administrative procedure. See Miller & Co. v. United States, 824 F.2d 961, 963 (Fed. Cir. 1987), cert. denied, 484 U.S. 1041 (1988). Thus, attorneys could not have predicted that any factual scenario leading to § 1581(a) jurisdiction was possible after the Supreme Court found 28 U.S.C. § 1581(i) jurisdiction in U.S. Shoe, 523 U.S. at 365. Nonetheless, the Federal Circuit did fashion in Swisher what is apparently an exception to the normal rule, so that both

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[1] Plaintiffs also seek interest from date of payment of the tax under 19 U.S.C. § 1505(c). This provision appears to be limited to import transactions.

[2] 28 U.S.C. § 2644 reads in relevant part: If, in a civil action in the Court of International Trade under section 515 of the Tariff Act of 1930, the plaintiff obtains monetary relief by a judgment or under a stipulation agreement, interest shall be allowed . . . . Such interest shall be calculated from the date of the filing of the summons in such action to the date of the refund.

parties who proceeded via the administrative refund route and those parties who sued directly may recover.[3]

Third, although this jurisdictional avenue was not predictable, the law firm representing Swisher before the Federal Circuit, which is also the firm representing these plaintiffs, continued to press its § 1581(a) jurisdictional argument based on denial of a refund request (for which no time limit was set) in order to avoid the two-year statute of limitations applicable to § 1581(i) claims. See 28 U.S.C. § 2636(i). As officers of the court, they surely would not have pressed this argument if it were frivolous. Aware of their own argument in Swisher, and deeming it worth pursuing in this court and the Court of Appeals, they nonetheless allowed the consent judgment forms to be signed, entered and payment to be made thereon.

Fourth, the court made clear that although it believed interest was owing in suits filed under § 1581(i), it indicated that the matter was by no means clear. See U.S. Shoe Corp. v. United States, 20 CIT 206, 207 (1996). Thus, if interest were of importance to its clients, plaintiffs' attorney should

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[3] The result seems to be based on equitable considerations including the fact that the refund procedure originally endorsed by Customs (that is, protest of the collection as opposed to refund denial) was not the correct one. There is at least an element of affirmatively misleading action (albeit innocent) on the part of government officials. One also might read Swisher as a generally applicable limitation or abrogation of the Miller rule, but an appellate panel may not overrule a previous panel. Thus, the court concludes that a Miller exception has been carved out for HMT refunds. At what point parties must opt for a § 1581(a) or a § 1581(i) method of recovery is not made clear. The court need not resolve this issue here because these cases have been resolved by agreement.

not have banked solely on an award of interest for claims made pursuant to cases settled under § 1581(i), but should have preserved the claims under § 1581(a) by not signing form consent judgments awarding judgment under § 1581(i), with interest expressly made dependent on the outcome of IBM, the § 1581(i) interest test case.

Plaintiffs' counsel never sought more flexible language on interest or on jurisdiction in the judgment form, although they are not strangers to the process that resulted in the claim resolution process and the form. Obviously, they expected that the consent judgment as written ultimately would give their clients all they were due, with the advantage of payment of principal earlier than could be expected if the cases remained stayed pending the Swisher litigation or perhaps proceeded separately.

The court was very liberal in allowing test cases to proceed on various types of claims on various theories. The court cannot say what might have happened if plaintiffs had sought a different procedure for their claims or whether they could have obtained early payment of principal and yet preserved these arguments. History cannot be undone, however.

Statutes providing for HMT on exports should not have been passed. The internal revenue interest statute should have provided for interest on HMT claims more clearly. Unfortunately, these statutory errors did occur. The court regrets all parties may not be made completely whole because they may be limited to post-judgment interest. This is an important concern, but also of concern is the need to end litigation and to hold parties to their bargain so that such bargains can be relied on now and in the future.

Contrary to the government's preference for one payout, the court required that principal be paid before the interest issue was resolved in order to limit harm if interest was not owed. The government met its payment deadlines. The court

will not compel the government to pay money on certain conditions and then change the conditions after payment is made, without a more serious case of injustice than is made here. If justice can tolerate the non-payment of interest on the § 1581(i) claims, as is the result of IBM, justice can tolerate holding these well-represented parties to their bargain.

Unless the Supreme Court reverses the IBM decision, these plaintiffs will not get interest from date of summons in 1995, 1996, and 1997, to dates of judgment, which would not have been earlier than late 1998. This is the bargain that was made.

Motion to Amend Judgment Denied.

/s/
Jane A. Restani
JUDGE

Dated: New York, New York

This 28th day of December, 2000.

NOTICE OF ENTRY AND SERVICE

This is a notice that an order or judgment was entered in the docket of this action, and was served upon the parties on the date shown below.

Service was made by depositing a copy of this order or judgment, together with any papers required by USCIT Rule 79(c), in a securely closed endorser penalty cover in a United States mail receptacle at One Federal Plaza, New York, New York 10007 and addressed to the attorney of record for each party at the address on the official docket in this action, except that service upon the United States was made by personally delivering a espy to the Attorney-In-Charge, International Trade Field Office, Civil Division, United States Department of Justice, 26 Federal Plaza, New York, New York 10278 or to a clerical employee designated, by the Attorney-In-Charge in a writing filed with the clerk of the court.

Leo M. Gordon
Clerk of the Court

Date: 12/28/00 By: /s/
Deputy Clerk

APPENDIX D

UNITED STATES COURT OF
INTERNATIONAL TRADE

JANE A. RESTANI, JUDGE

BASF CORPORATION, Plaintiff, v. THE UNITED STATES, Defendant.	:	Court No. 96-09-02123 and Court No. 96-12-02814
BASF MAGNETICS CORPORATION, Plaintiff, v. THE UNITED STATES, Defendant.	:	Court No. 96-09-02020
AKZO NOBEL CHEMICALS, INC., Plaintiff, v. THE UNITED STATES, Defendant.	:	Court No. 96-09-02108
REYNOLDS METALS COMPANY, Plaintiff, v. THE UNITED STATES, Defendant.	:	Court No. 96-09-02138

ZENECA INC.,	:	Court No. 96-09-
Plaintiff,	:	02140, Court No.
v.	:	97-08-01363 and
THE UNITED STATES,	:	Court No. 96-12-
Defendant.	:	02812
ISK BIOSCIENCES	:	
CORPORATION,	:	Court No. 95-04-
Plaintiff,	:	00529
v.	:	
THE UNITED STATES,	:	
Defendant.	:	
ARCHER-DANIELS MIDLAND	:	
COMPANY,	:	Court No. 96-09-
Plaintiff,	:	02111
v.	:	
THE UNITED STATES,	:	
Defendant.	:	
ADM/GROWMARK RIVER	:	
SYSTEMS, INC.,	:	Court No. 96-09-
Plaintiff,	:	02016
v.	:	
THE UNITED STATES,	:	
Defendant.	:	

VALLEY GRAIN PRODUCTS, INC.,	:	
Plaintiff,	:	Court No. 96-09-02119
v.	:	
THE UNITED STATES,	:	
Defendant.	:	

ORDER

The court's opinion in Hohenberg Bros. Company v. United States, No. 96-09-02074, Slip Op. 00-172 (Dec. 28, 2000), is hereby adopted and found dispositive of plaintiffs' motion to amend judgment.

MOTION DENIED.

/s/
Judge of the United States
Court of International Trade

Dated: New York, New York

This 4th day of January, 2001.

NOTICE OF ENTRY AND SERVICE

This is a notice that an order or judgment was entered in the docket of this action, and was served upon the parties on the date shown below.

Service was made by depositing a copy of this order or judgment, together with any papers required by USCIT Rule 79(c), in a securely closed endorser penalty cover in a United States mail receptacle at One Federal Plaza, New York, New York 10007 and addressed to the attorney of record for each party at the address on the official docket in this action, except that service upon the United States was made by personally delivering a espy to the Attorney-In-Charge, International Trade Field Office, Civil Division, United States Department of Justice, 26 Federal Plaza, New York, New York 10278 or to a clerical employee designated, by the Attorney-In-Charge in a writing filed with the clerk of the court.

Leo M. Gordon
Clerk of the Court

Date: 1/5/01 By: /s/
Deputy Clerk

APPENDIX E

UNITED STATES COURT OF INTERNATIONAL TRADE

HOHENBERG BROS. COMPANY, Plaintiff, v. THE UNITED STATES, Defendant.	:	Court No. 96-09-02074

ORDER

Plaintiff's motion for rehearing is denied. Grounds for rehearing are not met. In addition, arguments as to the finality of the judgment are unavailing in a case where payment was made before the conclusion of all proceedings for the benefit of plaintiff and the court is exercising its discretion not to allow amendment.

As indicated, these parties were not strangers to the Harbor Maintenance Tax litigation and could have requested revisions to the judgment form or taken other steps to preserve their interest claims. Further, Thomson Consumer Electronics v. United States, No. 00-1091, 2001 WL 388036 (Fed. Cir. Apr. 18, 2001) makes clear that the 28 U.S.C., § 1581(a) and (i) jurisdictional bases are available simultaneously in these cases challenging the constitutionality of the HMT. Plaintiff chose to rely solely on their rights under 28 U.S.C. § 1581(i) despite ongoing litigation as to 28 U.S.C. § 1581(a).

/s/
Jane A. Restani
JUDGE

Dated: New York, New York
This 10th day of May, 2001.

EXHIBIT A

HMT RELATED CASES

A.C. Monk and Company, Inc. v. United States	96-09-02014
The Austin Tobacco Company, Inc. v. United States	96-09-02141
Cargill Americas, Inc. v. United States	96-12-02808
Cargill Americas, Inc. v. United States	97-06-00970
Cargill Citro-America, Inc. v. United States	97-08-01358
Cargill Fertilizer, Inc. v. United States	97-06-00969
Cargill Fertilizer, Inc. v. United States	95-04-00449
Cargill, Incorporated v. United States	95-04-0448
Cargill, Incorporated v. United States	96-09-02073
Carolina Leaf Tobacco Company, Inc. v. United States	96-09-02024
Dibrell Brothers, Inc. v. United States	96-09-02028
Excel Corporation v. United States	95-04-00379
General Electric Company v. United States	96-09-02126

General Electric Company v. United States	97-08-01360
Hohenberg Bros. Company v. United States	95-04-00450
K.R. Edwards Leaf Tobacco Company, Inc. v. United States	96-09-02052
Maclin-Zimmer-McGill Tobacco Co., Inc. v. United States	96-09-02057
Monk-Austin International, Inc. v. United States	96-09-02059
Thorpe-Greenville Export Tobacco Co., Inc. v. United States	96-09-02114
T.S. Ragsdale Company, Inc. v. United States	96-09-02083
Universal Leaf Tobacco Company, Inc. v. United States	96-09-02118
U.S. Steel International, Inc. v. United States	96-09-02115
U.S. Steel International, Inc. v. United States	96-12-02820
U.S. Steel Mining Co., Inc. v. United States	96-09-02116
U.S. Steel Mining Co., Inc. v. United States	96-12-02811
USX Corporation v. United States	96-09-02091
USX Engineers & Consultants, Inc. v. United States	96-09-02092
BASF Corporation v. United States	96-09-02123

BASF Corporation v. United States	96-12-02814
BASF Magnetics Corporation v. United States	96-09-02020
Akzo Nobel Chemicals, Inc. v. United States	96-09-02018
Reynolds Metals Company v. United States	96-09-02138
Zeneca Inc. v. United States	96-09-02140
Zeneca Inc. v. United States	97-08-01363
Zeneca Inc. v. United States	96-12-02812
ISK Biosciences Corporation v. United States	95-04-00529
Archer-Daniels-Midland Company v. United States	96-09-02111
ADM/Growmark River Systems, Inc. v. United States	96-09-02016
Valley Grain Products, Inc. v. United States	96-09-02119
The Coleman Company v. United States	96-09-02087
Hill's Pet Nutrition Inc. v. United States	96-09-02044
Standard Commercial Tobacco Company v. United States	96-09-02081
Carolina Trading Corporation v. United States	96-09-02025
James I. Miller Tobacco Co., Inc. v. United States	96-09-02051

PMA Incorporated v. United States	96-09-02137
The Tobacco Trading Corporation v. United States	96-09-02088
W.A. Adams Company v. United States	96-09-02094
American Honda Motor Co., Inc. v. United States	96-09-02201
American Honda Motor Co., Inc. v. United States	96-12-02807
Honda Trading America Corporation v. United States	96-09-02205
Honda Trading America Corporation v. United States	96-12-02809
Honda Trading America Corporation v. United States	97-12-02079
BP Chemicals, Inc. v. United States	96-09-02021
BP Chemicals, Inc. v. United States	96-12-02815
CBS Corporation v. United States	96-09-02096
Continental Grain Company v. United States	96-09-02112
Conti Quincy Bunge, L.L.C. v. United States	96-09-02027
Tacoma Export Marketing Company v. United States	96-09-02084
Farmland Industries, Inc. v. United States	96-09-02034
Farmland Foods, Inc. v. United States	96-09-02032

Farmland Hydro, L.P v. United States	96-09-02033
Tradigrain, Inc. v. United States	96-12-02818
Tradigrain, S.A., Geneva v. United States	96-12-02819
Lexmark International, Inc. v. United States	96-09-02055
McDonnell Douglas Corporation v. United States	96-09-02208
Monsanto Company v. United States	96-09-02060
Solar Turbines Incorporated v. United States	96-09-02202
Solar Turbines Incorporated v. United States	96-12-02810
Solar Turbines Incorporated v. United States	97-09-01552
Solar Turbines Incorporated v. United States	97-08-01364
Solar Turbines Incorporated v. United States	97-12-02078
ECC International, Inc. v. United States	96-09-02029
ECCA Calcium Products, Inc. v. United States	96-09-02030
ECC International, Inc. and ECCA Calcium Products, Inc. v. United States	97-09-01560
Koch Carbon, Inc. v. United States	96-09-02053

Koch Refining Company v. United States	96-12-02054
Olin Corporation v. United States	96-09-02127
Physics International Company v. United States	96-09-02076
Sterling Chemicals, Inc. v. United States	96-09-02082
IMC Global Operations, Inc. v. United States	96-09-02047
IMC-Agrico Company v. United States	96-09-02048
International Multifoods Corporation v. United States	96-09-02049
International Multifoods Corporation v. United States	96-12-02816

APPENDIX F

UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

01-1460, -1461, -1462, -1463, -1464, -1465, -1466, -1467, -1468, -1469, -1470, -1471, -1472, -1473, -1474, -1475, -1476, -1477, -1478, -1479, -1480, -1481, -1482, -1483, -1484, -1485, -1486, -1487, -1488, -1489, -1490, -1491, -1492, -1493, -1494, -1495, -1496, -1497, -1498, -1499, -1500, -1501, -1502, -1503, -1504, -1505, -1506, -1507, -1508, -1509, -1510, -1511, -1512, -1513, -1514, -1515, -1516, -1517, -1518, -1519, -1520, -1521, -1522, -1523, -1524, -1525, -1526, -1527, -1528, -1529, -1530, -1531, -1532, -1533, -1534, -1535, -1536, -1537, -1538, -1539, -1540, -1541, -1542, and -1543.

HOHENBERG BROS. COMPANY, A.C. MONK AND COMPANY, INC., THE AUSTIN TOBACCO COMPANY, INC., CARGILL AMERICAS, INC., CARGILL CITRO-AMERICA, INC., CARGILL FERTILIZER, INC., CARGILL, INCORPORATED, CAROLINA LEAF TOBACCO COMPANY, INC., DIBRELL BROTHERS, INC., EXCEL CORPORATION, GENERAL ELECTRIC COMPANY, :K.R. EDWARDS LEAF TOBACCO COMPANY, INC., MACLIN-ZIMMER-MCGILL TOBACCO CO., INC., MONK-AUSTIN INTERNATIONAL, INC., THORPE-GREENVILLE EXPORT TOBACCO CO., INC., T.S. RAGSDALE COMPANY, INC., UNIVERSAL LEAF TOBACCO COMPANY, INC., U.S. STEEL INTERNATIONAL, INC., U.S. STEEL MINING CO., INC., USX CORPORATION, USX ENGINEERS & CONSULTANTS, INC., BASF CORPORATION, BASF MAGNETICS CORPORATION, AKZO NOBEL CHEMICALS, INC., REYNOLDS METALS COMPANY, ZENECA INC., ISK BIOSCIENCES CORPORATION,

ARCHER-DANIELS-MIDLAND COMPANY, ADM/GROWMARK RIVER SYSTEMS, INC., VALLEY GRAIN PRODUCTS, INC., THE COLEMAN COMPANY, HILL'S PET NUTRITION, INC., STANDARD COMMERICAL TOBACCO COMPANY, CAROLINA TRADING CORPORATION, JAMES I. MILLER TOBACCO CO., INC., PMA INCORPORATED, THE TOBACCO TRADING CORPORATION, W.A. ADAMS COMPANY, AMERICAN HONDA MOTOR CO., INC., HONDA TRADING AMERICA CORPORATION, BP CHEMICALS, INC., CBS CORPORATION, CONTINENTAL GRAIN COMPANY, CONTIQUINCY BUNGS, L.L.C., TACOMA EXPORT MARKETING COMPANY, FARMLAND INDUSTRIES, INC., FARMLAND FOODS, INC., FARMLAND HYDRO, L.P., TRADIGRAIN,1NC., TRADIGRAIN, S.A., GENEVA, LEXMARK INTERNATIONAL, INC., MCDONNELL DOUGLAS CORPORATION, MONSANTO COMPANY, SOLAR TURBINES INCORPORATED, EEC INTERNATIONAL, INC., ECCA CALCIUM PRODUCTS, INC., KOCH CARBON, INC., KOCH REFINING COMPANY, OLIN CORPORATION, PHYSICS INTERNATIONAL COMPANY, STERLING CHEMICALS, INC., IMC GLOBAL OPERATIONS, INC., IMC-AGRICO COMPANY, and INTERNATIONAL MULTIFOODS CORPORATION.

Plaintiffs-Appellants,

v.

UNITED STATES,

Defendant-Appellee.

ORDER

United States Court of Appeals for
the Federal Circuit

ORDER

A petition for rehearing en banc having been filed by the APPELLANTS, and the matter having first been referred as a petition for rehearing to the panel that heard the appeal, and thereafter the petition for rehearing en banc having been referred to the circuit judges who are in regular active service,

UPON CONSIDERATION THEREOF, it is

ORDERED that the petition for rehearing be, and the same hereby is, DENIED and it is further

ORDERED that the petition for rehearing en banc be, and the same hereby is, DENIED.

The mandate of the court will issue on November 12, 2002.

Circuit Judge SCHALL did not participate in the vote.

FOR THE COURT,

/s/
Jan Horbaly
Clerk

Dated: November 4, 2002

FILED
U.S. COURT
OF APPEALS FOR THE
FEDERAL CIRCUIT
Nov 4 2002

JAN HORBALY
CLERK

cc: Peter Buck Feller
Jeffrey A. Belkin

HOHENBERG BROS CO V. US, 01-1460,-1461 through – 1543 (CIT – 96-09-02074)

Note: Pursuant to Fed. Cir. R. 47.6 this order is not citable as precedent. It is a public record..

APPENDIX G

19 U.S.C.

§ 1505. Payment of duties and fees

(a) Deposit of estimated duties, fees, and interest

Unless merchandise is entered for warehouse or transportation, or under bond, the importer of record shall deposit with the Customs Service at the time of making entry, or at such later time as the Secretary may prescribe by regulation, the amount of duties and fees estimated to be payable thereon. Such regulations may provide that estimated duties and fees shall be deposited before or at the time an import activity summary statement is filed. If an import activity summary statement is filed, the estimated duties and fees shall be deposited together with interest, at a rate determined by the Secretary, accruing from the first date of the month the statement is required to be filed until the date such statement is actually filed.

(b) Collection or refund of duties, fees, and interest due upon liquidation or reliquidation

The Customs Service shall collect any increased or additional duties and fees due, together with interest thereon, or refund any excess moneys deposited, together with interest thereon, as determined on a liquidation or reliquidation. Duties, fees, and interest determined to be due upon liquidation or reliquidation are due 30 days after issuance of the bill for such payment. Refunds of excess moneys deposited, together with interest thereon, shall be paid within 30 days of liquidation or reliquidation.

(c) Interest

Interest assessed due to an underpayment of duties, fees, or interest shall accrue, at a rate determined by the Secretary, from the date the importer of record is required to deposit estimated duties, fees, and interest to the date of liquidation or reliquidation of the applicable entry or reconciliation. Interest on excess moneys deposited shall accrue, at a rate determined by the Secretary, from the date the importer of record deposits estimated duties, fees, and interest or, in a case in which a claim is made under section 1520(d) of this title, from the date on which such claim is made, to the date of liquidation or reliquidation of the applicable entry or reconciliation.

(d) Delinquency

If duties, fees, and interest determined to be due or refunded are not paid in full within the 30-day period specified in subsection (b) of this section, any unpaid balance shall be considered delinquent and bear interest by 30-day periods, at a rate determined by the Secretary, from the date of liquidation or reliquidation until the full balance is paid. No interest shall accrue during the 30-day period in which payment is actually made.

28 U.S.C.

§ 1581. Civil actions against the United States and agencies and officers thereof

(a) The Court of International Trade shall have exclusive jurisdiction of any civil action commenced to contest the denial of a protest, in whole, or in part, under section 515 of the Tariff Act of 1930.

28 U.S.C.

§ 2644. Interest

If, in a civil action in the Court of International Trade under section 515 of the Tariff Act of 1930, the plaintiff obtains monetary relief by a judgment or under a stipulation agreement, interest shall be allowed at an annual rate established under section 6621 of the Internal Revenue Code of 1986. Such interest shall be calculated from the date of the filing of the summons in such action to the date of the refund.

U.S. Const. art. I, § 9, cl. 5

No Tax or Duty shall be laid on Articles exported from any State.

U.S. Const. amend. V

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself; nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

APPENDIX H

IN THE UNITED STATES COURT OF INTERNATIONAL TRADE

BEFORE: THE HONORABLE JANE A. RESTANI, JUDGE

HOHENBERG BROS. COMPANY,	:	Court Nos. 95-04-00450
Plaintiff,	:	95-12-01585
v.	:	95-12-01648
THE UNITED STATES,	:	96-02-00552
Defendant.	:	96-04-01117
	:	96-06-01494
		96-09-02074
		96-11-02546
		96-12-02759
		97-02-00270
		97-05-00829
		97-10-01759
		98-04-00825

JUDGMENT

Pursuant to the procedures established by Order of the Court in Slip Op. 98-126, it is hereby agreed by counsel for the parties,

(A) Plaintiff, Hohenberg Bros. Company; and

(B) Defendant, the United States of America ("United States") that:

1. The claims and refunds covered by this Judgment are claims in Court Nos. 95-04-00450, 95-12-01585, 95-12-01648, 96-02-00552, 96-04-01117, 96-06-01494, 96-09-02074, 96-11-02546, 96-12-02759, 97-02-00270,

97-05-00829, 97-10-01759 and 98-04-00825 (schedule attached), relating to payments of the Harbor Maintenance Tax (HMT) on exports.

2. The court has jurisdiction under 28 U.S.C. § 1581(i) (1994).

3. The action was commenced on April 19, 1995.

4. The amounts set forth on the attached Harbor Maintenance Tax Payment Report and Certification were HMT payments for exports that plaintiff has certified were made and that have not previously been refunded.

5. Plaintiff is entitled to refunds of the payments on the attached Harbor Maintenance Tax Payment Report as provided by law in accordance with the decision in United States v. United States Shoe Corp., 118 S. Ct. 1290 (1998).

6. Interest shall be paid on the refunded amounts in accordance with a schedule set by the court should appellate court proceedings in International Business Machines Corp. v. United States, Court No. 94-10-00625, finally resolve that interest is owing on HMT payments.

7. All claims in this action relating to quarters other than those covered by the attached Harbor Maintenance Tax Payment Report or relating to HMT payments on other than foreign exports are hereby severed from this action (and the actions listed in the attached schedule) and designated as Court Nos. 95-04-00450-S, 95-12-01585-S, 95-12-01648-S, 96-02-00552-S, 96-04-01117-S, 96-06-01494-S, 96-09-02074-S, 96-11-02546-S, 96-12-02759-S, 97-02-00270-S, 97-O5-00829-S, 97-10-01759-S and 98-04-00825-S.

8. All other non-severed claims in this action are dismissed.

9. Upon entry of judgment, plaintiff releases, waives, and abandons all claims against the defendant, its officers,

agents, and assigns, arising out of all HMT export payments for the non-severed quarters identified in the attached Harbor Maintenance Tax Payment Report, including, but not limited to, all claims for costs, attorney fees, expenses, compensatory damages, and exemplary damages. Defendant releases, waives, and abandons all claims, other than fraud, that it may have against plaintiff, or its officers, agents, or employees arising out of all HMT export payments for the non-severed quarters identified in the attached Harbor Maintenance Tax Payment Report.

10. Undersigned counsel for the United States and for plaintiff represent that they are authorized by the United States and plaintiff, respectively, to consent to this judgment form.

11. The refund checks issued pursuant to this judgment shall be mailed to plaintiff within 30 days, care of the undersigned attorneys for plaintiff.

12. Each party will bear its own attorney fees, expenses and costs.

Peter Buck Feller
/s/

McKenna & Cuneo,
L.L.P.
1900 K Street, NW
Washington, DC
Tel: (202) 496-7500
Attorneys for Plaintiff
Date: 2-25-99

David W. Ogden
Acting Assistant Attorney General
/s/
David M. Cohen
Director
/s/
Jeanne Davidson
Deputy Director
Commercial Litigation Branch
Civil Division
Department of Justice
1100 L Street, N.W.
Washington, D.C. 20530
Tel: (202) 514-7300

Attorneys for Defendant
Date: 3-12-99

SO ORDERED:

/s/
JANE A. RESTANI
Judge
3/30/99

HOHENBERG BROS. COMPANY

SCHEDULE

United States Court of International Trade Numbers:

95-04-00450
95-12-01585
95-12-01648
96-02-00552
96-04-01117
96-06-01494
96-09-02074
96-11-02546
96-12-02759
97-02-00270
97-05-00829
97-10-01759
98-04-00825

Court No. 95-04-00450

HARBOR MAINTENANCE TAX PAYMENT REPORT AND CERTIFICATION

A. To be completed by Customs:

1. Name of Plaintiff (including all known variations):
   HOHENBERG BROS CO
   HOHENBERG BROS COMPANY
   HOHENBERG BROS. CO.
   HONENBERG BROS CO
   WOWENBERG BROS CO

2. Exporter Identification Number:
   62-0439772
   620439772

3. Quarterly Payments Not Previously Refunded to Plaintiff

Payment Quarter	Date Paid	Exporter Name	Amount Paid	Check Name
93 / 01	05/05/ 1993	HOHENBERG BROS CO	53,269.05	HOHENBERG BROS CO
93 / 02	08/06/ 1993	HOHENBERG BROS CO	48,498.61	HOHENBERG BROS CO
93 / 03	10/29/ 1993	HOHENBERG BROS COMPANY	22,712.50	HOHENBERG BROS COMPANY
93 / 04	01/31/ 1994	HOHENBERG BROS CO	31,334.62	HOHENBERG BROS CO
94 / 01	04/26/ 1994	HOHENBERG BROS COMPANY	60,975.08	HOHENBERG BROS CO
94 / 02	08/01/ 1994	HOHENBERG BROS COMPANY	77,042.56	HOHENBERG BROS COMPANY
94 / 03	11/01/ 1994	WOWENBERG BROS COMPANY	29,567.97	WOWENBERG BROS CO

95 / 02	02/29/ 1996	HOHENBERG BROS COMPANY	135,198.74	HOHENBERG BROS COMPANY
95 / 03	05/20/ 1996	HOHENBERG BROS COMPANY	26,085.91	HOHENBERG BROS COMPANY
95 / 04	11/14/ 1996	HOHENBERG BROS CO	98,712.01	HOHENBERG BROS CO
96 / 01	12/09/ 1996	HOHENBERG BROS COMPANY	246,975.53	HOHENBERG BROS COMPANY
96 / 02	02/14/ 1997	HOHENBERG BROS CO	37,854.60	HOHENBERG BROS CO
97 / 03	03/24/ 1998	HOHENBERG BROS CO	47,032.15	CARGILL INC
94 / 04	12/07/ 1995	HOHENBERG BROS CO	46,825.02	HOHENBERG BROS CO
95 / 01	12/07/ 1995	HOHENBERG BROS CO	275,322.72	
96 / 04	05/14/ 1997	HOHENBERG BROS COMPANY	117,134.49	HOHENBERG BROS COMPANY
97 / 01	10/21/ 1997	HOHENBERG BROS COMPANY	152,557.43	
97 / 02	10/21/ 1997	HOHENBERG BROS COMPANY	107,774.87	HOHENBERG BROS COMPANY

Total Amount Paid: $ 1,614,873.86

4. Refunds, If Any, Previously Made by Customs

Payment Quarter	Date Paid	Exporter Name	Amount Refunded	Date Refunded

Total Amount Refunded : $ 0.00

5. Total Amount Due: $ 1,614,873.86 /s/

/s/
Thomas A. Smith
Director
Accounting Services Division

B. To be completed by plaintiff:

I hereby certify on behalf of plaintiff that, to the best of my knowledge and belief, plaintiff paid the Harbor Maintenance Tax payments listed in number 3 and is entitled to a refund of those payments as listed in number 5.

/s/
Authorized Representative of Plaintiff

APPENDIX I

Slip Op. 95-23

UNITED STATES COURT OF INTERNATIONAL TRADE

UNITED STATES SHOE CORPORATION, Plaintiff, v. THE UNITED STATES OF AMERICA, Defendant.	) Court No. 94-11-00668)) Before: Dominick L. DiCarlo, Chief Judge Jane A. Restani, Judge R. Kenton Musgrave, Judge

SCHEDULING ORDER

As it appears that this captioned case, and the cases listed on the attachment to this order, and other cases that may subsequently be filed while the captioned case is pending, involve as a common issue the constitutionality of the Harbor Maintenance Tax imposed by 26 USC 4461-62; and, as it further appears that adoption of special procedures to reach a final and immediately appealable decision of the constitutional issue in the captioned case will reduce expenses and delays and expedite the disposition of all the cases; the court ORDERS:

1. Except as otherwise specified in this order, all further proceedings and the filing of papers in the captioned case, the cases listed in the attachment to this order, and all other cases subsequently filed in which the constitutionality of the Harbor Maintenance Tax is challenged, shall be stayed until further direction of the court.

2. By filing concurrent cross-motions for summary judgment, the parties in the captioned case shall address the following issues:

(a) Whether the court has subject matter jurisdiction to hear and decide this type of case;

(b) If so, does the court have that authority under 28 USC 1581(a) or (i) or both (a) and (i); and

(c) Does the imposition of the Harbor Maintenance Tax violate Article 1, Section 9, Clause 5 of the Constitution which provides that "no Tax or Duty shall be laid on Articles exported from any state."

3 The cross-motions for summary judgment and briefs in support of the respective cross-motions shall be filed no later than April 14, 1995. The supporting briefs shall not exceed 50 pages. Response briefs shall be filed no later than 30 days after the moving briefs are filed and shall not exceed 25 pages. No reply briefs are permitted. No extension of time will be allowed.

4 Plaintiffs in the cases listed in the attachment to this order are allowed by this order to participate as amicus curiae by filing briefs and participating in oral argument in support of the position of plaintiff in the captioned action. Plaintiffs in cases not listed in this attachment shall not be allowed to participate as amicus curiae. A plaintiff intending to participate as amicus curiae shall file with the court and serve upon the parties in the captioned action notice to that effect within 30 days from the date of this order. If an amicus curiae wishes to participate in the oral argument, the notice shall include a statement to that effect. An amicus curiae shall file its supporting brief subject to the same time and page limitations set forth in this order for plaintiff in the captioned action. No response brief may be filed by any amicus curiae. Defendant, at its discretion, may file a

consolidated brief in response to all amici curiae briefs or a separate brief in response to each amicus curiae brief. Defendant's consol dated brief, or separate briefs, shall not exceed one-half the total number of pages of all amici curiae briefs, and shall be filed no later than 60 days after amici curiae briefs are filed.

5. The parties in the captioned action shall advise the court within 30 days from the date of this order of any factual or legal issues, other than those specified in paragraph "2" above, to be determined before a final and immediately appealable decision may be rendered in the captioned case.

6. After responses briefs are filed, the court shall issue a supplement to this order setting a date, and apportioning time, for oral argument by the parties in the captioned action and amici curiae.

7. The captioned case previously has been assigned by the chief judge to a three-judge panel consisting of Judge DiCarlo together with Judges Restani and Musgrave. Cases listed in the attachment to this order not previously assigned to the three-judge panel are, by this order, assigned by the chief judge to the three-judge panel. Other cases subsequently filed in which the constitutionality of the Harbor Maintenance Tax is challenged also, by this order, are to be assigned to the three-judge panel

8. A copy of this order promptly shall be filed by the clerk of the court in each case listed in the attachment to this order, and provided to the plaintiff in each such case. A copy of this order promptly shall be provided by the clerk of the court to the plaintiff in each case subsequently filed in which the constitutionality of the Harbor Maintenance Tax is challenged.

FOR THE COURT
/s/
DOMINICK L. DiCARLO,
Chief Judge

Dated: February 15, 1995
New York, NY

NOTICE OF ENTRY AND SERVICE

This is to confirm that an order or judgment entered in the docket of this action, and was served upon the parties on the date shown below.

Service was made by depositing a copy of this order or judgment, together with any papers required by USCIT Rule 79(c), in a securely closed endorsed penalty cover in a United States mail receptacle at One Federal Plaza, New York, New York 10007 and addressed to the attorney of record for each party at the address on the official docket in this action, except that service upon the United States was made by personally delivering a copy to the Attorney-In-Charge, International Trade Field Office, Civil Division, United States Department of Justice, 26 Federal Plaza, New York, New York 10278 or to a clerical employee designated, by the Attorney-In-Charge in a writing filed with the clerk of the court.

Joseph E. Lomparol
Clerk of the Court

Date: February 15, 1995 By: /s/
Deputy Clerk

ATTACHMENT

LIST OF HARBOR MAINTENANCE TAX CASES

Court No.	Plaintiff	Law Firm Abrv.
93-10-00691	Carnival Cruise Lines, (Includes 94-03-00155 – Hal Antillen, N.V.)	PWRW&G
94-09-00525	Itochu International, Inc. formerly known as C. Itoch & Co. (America) Inc.	SM&D
94-09-00526	United States Shoe Corporation	SM&D
94-09-00527	Agrevo USA Company and Nor-Am Chemical Co.	T&D
94-09-00535	Celebrity Cruise Lines, Et. AL.	T&D
94-10-00578	A&A International	SPC&B
94-10-00581	Eastman Kodak Company	SM&D
94-10-00615	Etonic Irc.	GDL&S
94-10-00625	International Business Machines	B&M
94-10-00635	General Chemical Corporation	R&Q
94-10-00636	Sumitomo Corporation of America	R&Q
94-10-00637	Thomaston Mills, Inc.	SM&D
94-10-00638	Avon Products, Inc.	SM&D

94-10-00639	Ingersoll-Rand Company	SM&D
94-10-00650	Baxter Healthcard Corporation	KM&Z
94-10-00651	Hewlett-Packard Company	B&M
94-10-00653	Xerox Corporation	NP&W
94-10-00654	Xerox Corp., Americas Operations Division	NP&W
94-10-00655	Xerox Corp., Southern Calif. Mfg. Operations	NP&W
94-10-00656	Xerox International Partners	NP&W
94-10-00657	General Glass International Corporation	NP&W
94-10-00658	Fieldston Clothes, Inc.	NP&W
94-11-00660	Firmenich Inc. & Chemfleur Inc.	BR&C-NY
94-11-00665	Outboard Marine Corporation	SA&R
94-11-00668	United States Shoe Corporation	SM&D
94-11-00669	Itochu International, Inc.	SM&D
94-11-00670	Isuzu Motors America, Inc.	SM&D
94-11-00671	Agrevo USA Company and Nor-Am Chemical Company	T&D
94-11-00682	Mondial International Corporation, and all other similarly situated persons	GDL&S

	who have paid Harbor Maintenance fees pursuant to 19 C.F.R. 24.21 in connection with exportations of merchandise and passenger service from the United States	
94-11-00691	United Grain Corporation	SM&D
94-11-00701	Nissho Iwai American Corporation	SPC&B
94-11-00704	The Heil Company	GDL&S
94-11-00719	Berwick Industries, Inc.	NP&W
94-11-00720	Uniroyal Chemical Company, Inc.	NP&W
94-11-00726	Bunge Corporation	SPC&B
94-12-00731	Newell International	R&Q
94-12-00732	Siemens Energy & Automation, Inc., Et AL.	R&Q
94-12-00749	International Veneer Co.	GDL&S
94-12-00752	Liberty Gold Fruit Co., Inc.	OKG&S
94-12-00756	Polaroid Corporation	BR&C-W
94-12-00783	American Natural Soda Ash Corp.	CB
94-12-00784	United Export Corporation	CB
94-12-00785	ABRO Industries	CB
94-12-00786	GSI Exim America, Inc.	CB
94-12-00787	Vitol S.A., Inc.	CB

94-12-00788	MC International D/B/A McClean Group L.P.	CB
94-12-00792	Bridgestone/Firestone, Inc.	CB
94-12-00793	Siemens Solar Industries	R&Q
94-12-00802	Armstrong World Industries, Inc.	DD&H
94-12-00803	Fisher Controls International	B&M
95-01-00013	Alpert & Alpert International, Inc.	SSS&O
95-01-00017	Sunkist Growers	CSR&S
95-01-00033	Aluminum Company of America, Et Al.	LLG&M
95-01-00034	Astra Oil Company, Inc.	P&M
95-01-00035	Westport Petroleum, Inc.	P&M
95-01-00039	Dorland Management, Inc.	CB
95-01-00045	Unisys Corporation	R&Q
95-01-00054	Bartlet and Company	SM&D
95-01-00056	FAI Trading Company	CB
95-01-00057	Star Enterprise, Inc.	CB
95-01-00058	Vista Chemical Company	CB
95-01-00059	Champion International Corporation	CB
95-01-00060	Champion Export Corporation	CB
95-01-00061	Seagate Technology	B&M

95-01-00062	Marubeni America Corporation	FK&C
95-01-00065	New Holland North America, Inc.	D&W
95-01-00069	International Business Machines Corporation	B&M
95-01-00070	E.I. du Pont Nemours and Company	C&M
95-01-00075	Atlantic Richfield Company	P&M
95-01-00076	Otis Elevator Company	SM&D
95-01-00077	Carrier Corporation	SM&D
95-01-00078	Sikorsky Aircraft Corporation	SM&D
95-01-00079	Turbo Power & Marine Systems, Inc.	SM&D
95-01-00080	ISP Technologies, Inc.	CB

95-01-00083	Titan Textile Company, Inc. and Titan Spun Yarns Div. of Titan Textile Company	SM&D
95-01-00084	Dillon Yarn Company	SM&D
95-01-00085	Elcom, Inc.	SM&D
95-01-00086	Zen-Noh Grain (Export) Corporation	BURKE&M
95-01-00087	Texaco Refining and Marketing Inc.	CB
95-01-00088	Ingersoll-Dresser Pump Company	SM&D
95-01-00089	The Goodyear Tire & Rubber Company	SM&D
95-01-00090	Goodyear International Corporation	SM&D
95-01-00091	The Kelly-Springfield Tire Corporation	SM&D
95-01-00092	Ford Motor Company	FMC
95-01-00093	Fel-Pro Incorporated	KM&Z
95-01-00094	Germain-Webber Lumber Co., Inc.	GDL&S
95-01-00095	Boise Cascade Corporation	GDL&S
95-01-00098	Glancore Ltd.	V&F
95-01-00103	FMC Corporation	SM&D
95-01-00104	FMC Wyoming Corporation	SM&D
95-01-00105	Sofec, Inc.	SM&D

95-01-00106	Inco Alloys International, Inc.	SM&D
95-01-00107	A.C.X. Trading, Inc.	KM&Z
95-01-00111	Minnesota Mining and Manufacturing Company	B&M
95-01-00114	Aris-Isotomer, Inc.	NP&W
95-01-00115	Chevron U.S.A., Inc.	NP&W
95-01-00116	Chevron Chemical Company	NP&W
95-01-00117	Chevron Chemical International Sales, Inc.	NP&W
95-01-00118	Chevron International Oil Company	NP&W
95-01-00119	Chevron Overseas Petroleum, Inc.	NP&W
95-01-00120	Microsoft Corporation	NP&W
95-01-00121	The Pillsbury Company	NP&W
95-01-00122	Rhone-Polenc, Inc., Et Al.	NP&W
95-01-00123	Brown-Forman Corporation	B&M
95-01-00124	FMC Corporation	SM&D
95-01-00131	Itochu International, Inc., formerly known as C. Itoh & Company (America), Inc.	SM&D
95-01-00145	Allied Textiles Sales Company	IAM
95-01-00146	Sheftel International, Inc.	IAM
95-01-00147	Fab-Tech, Inc.	IAM
95-01-00148	Sirex, Ltd.	IAM

95-01-00149	Debois Textiles, Inc.	IAM
95-01-00150	Bollag International Corporation	IAM
95-01-00151	Capital Textiles, Inc.	IAM
95-01-00152	M. Koppel Company	IAM
95-01-00153	Dumont Export Corporation	IAM
95-01-00154	United Overseas Corporation	IAM
95-01-00155	Regent Corporation	IAM
95-01-00156	Muran Universal, Inc.	IAM
95-01-00159	Texport Oil Company	P&M
95-01-00163	Aluminum Company of America, Alcoa International S.A., Alcoa Inter-America, Inc.	IAM

Attachment

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Supreme Court, U.S.
FILED
APR 21 2003
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No. 02-1286

In the Supreme Court of the United States

HOHENBERG BROS. CO., ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Whether the court of appeals properly enforced the stipulated judgment entered into by petitioners.

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BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-11a) is reported at 301 F.3d 1299. The opinion of the Court of International Trade (Pet. App. 16a-25a) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on August 26, 2002. The petition for rehearing was denied on November 4, 2002 (Pet. App. 38a-40a). On January 22, 2003, the Chief Justice extended the time within which to file a petition for a writ of certiorari to and including March 4, 2003. The petition was filed on

February 27, 2003. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(l).

STATEMENT

1. Petitioners are exporters who paid the Harbor Maintenance Tax that applies to "any port use" by commercial importers, exporters, domestic shippers, and passenger lines. 26 U.S.C. 4461(a). The purpose of this harbor use fee is to require the entities that benefit from the use of port facilities to share the burden of the costs borne by the United States in maintaining those facilities. See, *e.g.*, S. Rep. No. 126, 99th Cong., 1st Sess. 3-4 (1985). The funds collected by the United States through this port use fee are paid into the Harbor Maintenance Trust Fund and thereafter expended on the operation and maintenance of channels and harbors throughout the United States. 26 U.S.C. 9505(a),(c). Petitioners brought this suit to obtain a refund of their harbor maintenance tax payments.

In *United States* v. *United States Shoe Corp.*, 523 U.S. 360 (1998), this Court held that, in the form presently imposed, these harbor fees could not be applied to exporters under the Export Clause of the Constitution. The Court emphasized that exporters are not "exempt from any and all user fees designed to defray the cost of harbor development and maintenance." *Id.* at 370. The Court held, however, "that such a fee must fairly match the exporters' use of port services and facilities" (*ibid.*) and concluded that the Harbor Maintenance Tax does not qualify as "a bona fide user fee in the Export Clause context" because the value of the exported cargo on which the Harbor Maintenance Tax is calculated (26 U.S.C. 4461(b)) "does not correlate reliably with the federal harbor services used or usable by the exporter." *Id.* at 369. The Court indicated, by

contrast, that a harbor maintenance charge applying to exports could be sustained if it were instead based "on factors such as the size and tonnage of a vessel, the length of time it spends in port, and the services it requires." *Ibid.*

Following this Court's decision in *United States Shoe Corp.*, petitioners and the government signed a stipulated final judgment in this case that entitled petitioners to an immediate refund of their Harbor Maintenance Tax payments. Neither party appealed that stipulated final judgment. The amounts determined under that judgment were promptly paid to petitioners by the United States. Pet. App. 4a.

2. The stipulated final judgment in this case specified that an amended judgment would be entered to allow interest on the principal amounts of the judgment if the appellate proceedings in the then-pending test case of *International Business Machines Corp.* v. *United States*, 201 F.3d 1367 (Fed. Cir. 2000) (*IBM*), held that interest was to be paid. Pet. App. 4a. In the *IBM* case, however, the court of appeals eventually determined that interest was not authorized on these refunds. 201 F.3d at 1374. On February 20, 2001, this Court denied the petition for a writ of certiorari in the *IBM* case. 531 U.S. 1183.[1]

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[1] Following the denial of IBM's petition for a writ of certiorari, IBM attempted to assert various non-statutory, interest theories before the trial court, to which the case had been remanded for vacatur of the original award of interest pursuant to 28 U.S.C. 2411. The Court of International Trade determined that the appellate court's mandate precluded consideration of IBM's non-statutory theories, and further noted that it would deny any claims to interest based upon such theories were it to consider them. The United States Court of Appeals for the Federal Circuit affirmed

3. Not satisfied with this result, petitioners filed a motion before the Court of International Trade in which they sought to amend the stipulated final judgment to permit them to seek an award of interest on grounds that had not been raised in the *IBM* case. The Court of International Trade denied that motion (Pet. App. 16a-25a), and the court of appeals affirmed (*id.* at 1a-11a).

The court of appeals noted that the stipulated judgment signed by petitioners "expressly waived all future claims arising out of its [Harbor Maintenance Tax] export payments against the government." Pet. App. 10a. The consent judgment entered into by the parties "states that the Court of International Trade had jurisdiction under [28 U.S.C.] 1581(i)" and further "expressly states that interest on the refunded amounts depends on the outcome of *IBM*, the § 1581(i) interest test case." Pet. App. 8a (Judgment ¶¶ 2, 6). In the consent judgment, the petitioners also "waived all future claims." *Ibid.* (Judgment ¶ 9). "In short, [petitioners] chose to receive immediate compensation and took a gamble on the outcome of *IBM*." *Id.* at 10a. The court concluded that the "parties to the consent judgment are bound by the terms of the judgment" and held that "the Court of International Trade did not abuse its discretion by holding [petitioners] to [their] bargain and refusing to amend the judgment." *Ibid.* The court further noted that, in *United States Shoe Corp.* v. *United States*, 296 F.3d 1378 (Fed. Cir. 2002), petition for cert. pending, No. 02-1221 (filed Feb. 19, 2003), the court had in any event determined that petitioners' newly advanced theories for an award of interest lack merit. Pet. App. 11a.

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that decision on March 19, 2003. The time for IBM to seek a writ of certiorari has not yet expired.

ARGUMENT

The decision of the court of appeals is correct and does not conflict with any decision of this Court or any other court of appeals. Further review is therefore not warranted.

1. The court of appeals correctly concluded that, by entering into the consent judgment, petitioners made an informed decision to forego any interest award other than the award, if any, resulting from the *IBM* test case. The consent judgment "expressly states that interest on the refunded amounts depends on the outcome of *IBM*, the § 1581(i) interest test case." Pet. App. 8a (Judgment ¶ 6). The consent judgment also expressly "waived all future claims" for interest that petitioners might have. *Ibid.* (Judgment ¶ 9). "In short, [petitioners] chose to receive immediate compensation and took a gamble on the outcome of *IBM*." *Id.* at 10a. Having taken that "gamble" and lost, the court of appeals properly found that the petitioners could not now seek to assert any further claim. *Ibid.* As the court emphasized, "parties to the consent judgment are bound by the terms of the judgment" and it was not an abuse of discretion for the trial court to hold petitioners to their "bargain and refus[e] to amend the judgment." *Ibid.*

In reaching these conclusions, the court of appeals properly applied "general principles of contract law" in interpreting the stipulated judgment. Pet. App. 6a. Application of those general principles to the particular facts of this case creates no conflict among the circuits and does not warrant review by this Court.

Similarly, the court's determination that the Court of International Trade did not abuse its discretion in declining to amend the judgment provides no basis for

further review. The court of appeals properly noted that a refusal to amend the stipulated judgment was reviewed under an abuse of discretion standard, and that the proponent therefore must show that the trial court's decision was "clearly unreasonable, arbitrary or fanciful, or based on clearly erroneous findings of fact or erroneous conclusions of law." Pet. App. 6a. Petitioners do not even contend that the Court of International Trade made any such error in denying the motion to amend.

2. Because petitioners waived any claim for future or additional relief, they have not preserved the new theories for the recovery of interest that were first raised—and rejected by the Federal Circuit—in *United States Shoe Corp.* v. *United States*, 296 F.3d 1378 (2002), petition for cert. pending, No. 02-1221 (*United States Shoe Corp. II*). Since petitioners in *this* case agreed to be bound by the outcome of the *IBM* case, and to waive any other claims (Pet. App. 6a), the resolution of the claims asserted in *United States Shoe Corp. II* have no relevance to this case. And, since the exporter in *United States Shoe Corp. II* did not enter into the consent judgment that petitioners signed in this case, the claims presented in *United States Shoe Corp. II* are not affected by the denial of petitioners' motion to amend their consent judgment in this case.

The petition in this case should therefore be denied regardless of the resolution of the petition in *United States Shoe Corp. II*. Moreover, for the reasons stated in detail in our brief in opposition to the petition for a writ of certiorari in *United States Shoe Corp. II*, the additional interest theories advanced by the petitioner in *that* case were also properly rejected by the court of

appeals and do not warrant further review by this Court.[2]

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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APRIL 2003

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[2] We are providing herewith to petitioners a copy of the brief in opposition filed by the United States in *United States Shoe Corp. II*, No. 02-1221.

Supreme Court, U.S.
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(3)

No. 02-1286

IN THE

Supreme Court of the United States

HOHENBERG BROS. COMPANY, *et al.*,
Petitioners,

v.

UNITED STATES OF AMERICA,
Respondent.

On Petition For A Writ Of Certiorari To The U.S. Court Of Appeals For The Federal Circuit

REPLY IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

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17 pp

RULE 29.6 DISCLOSURE

Petitioners incorporate by reference the Rule 29.6 disclosure statement set forth in their Petition for Certiorari in this case.

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STATUTES

19 U.S.C. § 1505 1

ARGUMENT

The government does not dispute that the issues in this case substantially overlap with those in *United States Shoe Corp. v. United States*, 296 F.3d 1378 (Fed. Cir. 2002) ("*United States Shoe II*"), because Petitioners in both cases seek interest under 19 U.S.C. § 1505, the Takings Clause, and the Export Clause. However, the government argues that the Court should not hold this Petition pending its ruling in *United States Shoe II*, because Petitioners allegedly have waived their rights to interest. The government's argument is based upon an erroneous reading of the Federal Circuit's opinion and a misinterpretation of the waiver provision in Petitioners' judgments. In any event, the government's waiver argument is a collateral issue that should be addressed by the Federal Circuit on remand if this Court holds, in *United States Shoe II*, that there is a right to interest on HMT refunds.

1. The Federal Circuit did not hold that Petitioners waived rights to interest by executing their stipulated judgments. The Circuit implicitly rejected the government's waiver analysis by issuing a ruling on the merits of Petitioners' interest claims, denying interest under 19 U.S.C. § 1505, the Takings Clause, and the Export Clause. (Pet. App. 11a; *see also* Cert. Opp. at 4 (conceding that the Circuit "determined that petitioners' newly advanced theories for an award of interest lack merit").) There obviously would have been no need for the Circuit to reach the merits of Petitioners' interest claims if the claims had been waived.

The Federal Circuit's opinion does not hold otherwise. In particular, the Federal Circuit did not rule that interest claims were included within Petitioners' waiver of "future claims." (*See* Cert. Opp. at 4-5 (citing Pet. App. 10a).) The *original* claims asserted in Petitioner's complaints sought a refund of

tax principal plus interest. Petitioners' judgments *granted* partial relief on these original claims (by ordering a refund of principal and reserving the question of interest) but waived unrelated collateral claims that Petitioners might otherwise want to assert for the first time in the *future*, following entry of the judgment. For example, Petitioners waived future claims seeking consequential or punitive damages for the government's unconstitutional conduct. (*See* Pet. App. 49a-50a ¶ 9 (waiving damages claims "[u]pon entry of judgment".)[1]

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[1] The language of Petitioners' judgments (including the waiver provision) was promulgated by the CIT in connection with the refund process that followed this Court's ruling in *United States Shoe I*. (*See* Pet. at 3-4.) The CIT solicited draft language for the waiver provision, and in doing so made clear that the waiver was intended to protect the government against claims (such as claims for damages) that were *collateral* to claims for a refund of tax principal:

> THE COURT: . . . The government says they still need some kind of release. I really think the government should be able to get a release of claims that relate to the same payments that are being paid, so that there can't be any *damage* claims or any *collateral* or *contingent* claims coming out of the payments that are made. Nobody has provided me with a draft of such a limited kind of release, but I think the judgment should include that, in that there is some element of stipulation in the judgment.

(Reply App. 2a-3a (emphasis added); *see also* Reply App. 3a-4a (purpose of waiver was to preclude "consequential damage claims" stemming from the payments that the government would be refunding under the judgments).) The waiver of collateral claims did not encompass rights to interest. It is black-letter law that an interest claim is a *part of*, rather than collateral to, a claim for return of principal. *See, e.g., Cinerama, Inc. v. Sweet Music, S.A.*, 482 F.2d 66, 69-70 (2d Cir. 1973) (Friendly, J.) (right to principal and interest is a single indivisible claim); *Wheeler Mach. Co. v. Mountain States Mineral Enter.*, 696 F.2d 787, 789 (10th Cir. 1983) (same).

Accordingly, when the Federal Circuit stated that Petitioners had waived "future claims," it was referring to claims that had nothing to do with Petitioners' claims for interest, which were adjudicated on the merits. (*See* Pet. App. 11a.) Indeed, Customs expressly confirmed in writing, prior to entry of judgment, that the waiver of future claims "exclude[d] interest":

> Upon entry of the judgment, plaintiff releases, waives, and abandons all claims against the defendant, its officers, agents and assigns, arising out of all HMT export payments for the non-severed quarters identified in the HMT Payment Report and Certification form, including, but not limited to, all claims for costs, attorney fees, expenses, compensatory damages, and exemplary damages, *excluding interest.*

(Reply App. 5a-6a (emphasis added).)

2. Even if the government's waiver analysis were entirely correct, Petitioners would not be foreclosed from receiving interest if this Court awards interest in *United States Shoe II.* The government does not assert that Petitioners have waived *all* rights to interest and agrees that Petitioners are entitled to interest if interest is awarded in the *IBM* case. (Cert. Opp. at 5.) A ruling for the taxpayer in *United States Shoe II* should lead to an interest award in *IBM*, because both cases address the same question – whether interest is owing on HMT refunds. Under those circumstances, even the government's analysis establishes that Petitioners would be entitled to interest. (*Id.*)[2]

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[2] The government is wrong when it suggests that the taxpayer in *IBM* is currently foreclosed from receiving an award of interest. (Cert. Opp. at 3

(Footnote cont'd on next page)

3. Finally, this Court should not adjudicate the merits of the waiver question in connection with the Petition for Certiorari in this case even if the government had raised a colorable waiver argument. Adjudicating the waiver question would require analyzing the record materials and divining the intent of the parties at the time they executed their stipulated judgments. This Court should not make that determination in a ruling on a Petition for Certiorari. The proper course is for the Court to hold the Petition pending its disposition of the Petition for Certiorari in *United States Shoe II*, vacate the judgment, and remand this case to the Federal Circuit for that court to address any waiver question.

CONCLUSION

The Court should hold the Petition in this case pending disposition of *United States Shoe II* and then grant the Petition, vacate the Federal Circuit's judgment, and remand this case to the Circuit for further proceedings consistent with *United States Shoe II*.

(Footnote cont'd from previous page.)

& n.1.) The Federal Circuit recently issued its opinion in the second *IBM* appeal. *IBM Corp. v. United States*, No. 02-1356, 2003 U.S. App. LEXIS 5396 (Fed. Cir. Mar. 19, 2003) ("*IBM II*"). In *IBM II*, the Circuit denied interest by relying on *United States Shoe II;* the two cases therefore present many of the same substantive issues. We are informed that a Petition for Certiorari in *IBM II* will soon be filed in this Court. If the Court holds the *IBM II* Petition pending its ruling in *United States Shoe II* and then awards interest in *United States Shoe II*, IBM also should receive an award of interest.

Respectfully submitted,

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Counsel for Petitioners

May 5, 2003

REPLY APPENDIX

APPENDIX A

UNITED STATES OF AMERICA
COURT OF INTERNATIONAL TRADE

UNITED STATES SHOE CORP.

Plaintiff

v.

Court No.
94-11-00668

UNITED STATES,

Defendant.

One Federal Plaza
New York, New York

August 20, 1998
11:00 a.m.

BEFORE: THE HONORABLE JANE A. RESTANI

APPEARANCES:

On behalf of Plaintiff:

SIEGEL MANDEL & DAVIDSON
BY: PAUL HOROWITZ

COUDERT BROTHERS
BY: MR. BECKER

LUMPFORD PAGE HALL, ESQ.

CAT & NUCHIN
BY: MICHAEL ROLL, ESQ.

BAKER McKENZIE
BY: MICHAEL CONE, ESQ.

KEVIN HORGAN, ESQ.

LAMB & LURCH
BY: SIDNEY KUFLICK

BARNES, RICHARDSON & COLBURN
BY: JAMES O. KELLEY

STEVE SOZNOFF, ESQ.

BURKE & MEYER
BY: JAMES BURKE, ESQ.

PATRICK GILL, ESQ.
RODEY & QUAILEY

On behalf of Defendant:

JEANNE E. DAVIDSON, ESQ.

TODD M. HUGHES, ESQ.

LARA LEVINSON, ESQ.

* * * *

THE COURT: Okay. Oh, release, I forgot to mention that. The government says they still need some kind of release. I really think the government should be able to get a release of claims that relate to the same payments that

are being paid, so that there can't be any damage claims or any collateral or contingent claims coming out of the payments that are made. Nobody has provided me with a draft of such a limited kind of release, but I think the judgment should include that, in that there is some element of stipulation in the judgment.

Do you have any problem with that?

MR. BECKER: No. I don't, your Honor.

THE COURT: Okay. So kind of limited release, okay.

* * * *

MR. BECKER: Might the Court consider a submission by the steering committee of a proposed release form?

THE COURT: Yes. Show it to Ms. Davidson.

MS. DAVIDSON: Right, yes, we could talk about it.

THE COURT: I want you to work on some kind of narrow ---

MS. DAVIDSON: We could talk about it. The language we submitted we use all the time, and I've used it in 592 cases.

THE COURT: They're right. They shouldn't have damage claims stemming from the payments. We're settling the payments, that's it. If you want your payment, you know, those aren't real claims. I don't want people giving up real claims. Those are the claims, the older claims, and claims for imports or whatever other stuff.

MS. DAVIDSON: For those payments.

THE COURT: For those payments; there shouldn't be consequential damage claims remaining for those

payments. If you want those payments, you get those payments.

* * * *

APPENDIX B

DEPARTMENT OF THE TREASURY
U.S. CUSTOMS SERVICE
INDIANAPOLIS, INDIANA

December 10, 1998

FILE: FIS-5-22-0F-AS:AR DT

Honenberg Bros. Company
McKenna & Cuneo, LLP
Att: HMT
1900 K Street, NW
Washington, DC 20006-0000

We are sending your Harbor Maintenance Tax (HMT) Payment Report and Certification form, which lists the HMT payments, within the two-year statute of limitations period, that Customs has identified from its database. Please verify that the plaintiff paid the payments listed on the form.

If you are satisfied with the payments listed on the HMT Payment Report and Certification, please sign the form certifying to the best of your knowledge and belief that the plaintiff paid the HMT payments listed in number three and are entitled to a refund of those payments as listed in number five. You must complete a judgment form with the HMT Payment Report and Certification form attached and submit it to the Department of Justice at the following address:

Department of Justice
Attention: Doris Lucas, Room 11041
1100 L Street, NW
Washington, DC 20530

Upon entry of the judgment, plaintiff releases, waives, and abandons all claims against the defendant, its officers, agents

and assigns, arising out of all HMT export payments for the non-severed quarters identified in the HMT Payment Report and Certification form, including, but not limited to, all claims for costs, attorney fees, expenses, compensatory damages, and exemplary damages, excluding interest. Defendant releases, waives, and abandons all claims, other than fraud, that it may have against plaintiff, or its officers, agents, or employees arising out of all HMT export payments for the non-severed quarters identified in the attached HMT Payment Report and Certification form.

If you dispute the completeness and accuracy of the payments listed on the HMT Payment Report and Certification form, please provide supporting documentation for the different or additional payments along with a point of contact name and phone number to Customs at the following address:

U.S. Customs Service
HMT Refunds
P.O. Box 68940
Indianapolis, IN 46268

or

U.S. Customs Service
HMT Refunds
Suite 750
7920 Georgetown Road
Indianapolis, IN 46268

Customs will then research paper records in an attempt to resolve the dispute. A new HMT Payment Report and Certification form will be returned to you within sixty days. If the revised certification is satisfactory, you must certify the information, complete a judgment form, and submit both to the Department of Justice at the address provided in this letter. If you continue to dispute the payments on the new HMT Payment Report and Certification form, please contact the Department of Justice, in writing, at the address provided in this letter. Any dispute that cannot be resolved will be submitted to the Court of International Trade for resolution.

Sincerely
/s/
Thomas A. Smith
Director
Accounting Services Division

Attachments